Crossing the I's and Dotting the T's: The Year in Court-Martial Personnel, *Voir Dire* and Challenges, and Pleas and Pretrial Agreements

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Introduction

The last couple of years witnessed much discussion concerning whether the military justice system should undergo, or was undergoing, a revolution.[1] Particular matters under this revolution microscope in the area of pretrial procedures include the role of the convening authority in the selection of panel members, as well as the role of the military judge.[2] Last year's opinions, in contrast, herald a return to the basics, with exceptions in two areas: challenges for cause based on the implied bias of panel members and the authority of the military judge. As to the first, the Court of Appeals for the Armed Forces (CAAF) continued to expansively interpret the doctrine of implied bias. This trend is perhaps a result of, or in reaction to, the failure to revolutionize the current system of panel member selection, which continues to rest with the convening authority, who also refers the case to trial and acts on the findings and sentence.[3] As to the second, the authority of the military judge, the CAAF rejected a government appeal challenging the Army Court of Criminal Appeals' (ACCA) expansive view of the post-trial power of the military judge. In addition, the Navy-Marine Court of Criminal Appeals (NMCCA) reminded military judges that they retain authority post-trial to correct errors that arise after trial that "substantially affect[] the legal sufficiency of any finding of guilty or the sentence."[4]

In matters other than implied bias and the authority of the military judge, many of last year's opinions from both the CAAF and the service courts involving the subjects of this article reflected and bemoaned an alarming lack of attention to detail by participants in the military justice process, especially the military judge and the trial counsel. This lack of attention to detail manifests itself most obviously in the arena of pleas and pretrial agreements. Military judges continue to fail to cover the elements of offenses during the providence inquiry, or to define them sufficiently. The CAAF dealt with this shortfall last term in *United States v. Redlinski*,[5] but it continues unabated, in both published and unpublished service court opinions. In addition, military judges skipped other portions of the so-called "script" for guilty plea inquiries contained in the *Military Judge's Benchbook*,[6] including advice concerning the rights waived by a guilty plea. This specific issue arose outside of the military justice system as well, and the U.S. Supreme Court issued an opinion on the matter in 2002. In *United States v. Hansen*,[7] the CAAF rejected the Supreme Court's view, and declined to shift responsibility to the defense counsel for ensuring the accused is properly advised of the rights he foregoes by pleading guilty. Instead, the CAAF continued to rest this responsibility squarely upon the shoulders of the military judge.

Court-Martial Personnel

This year saw new developments in several areas concerning court-martial personnel. The CAAF issued a decision concerning errors in "triggering mechanisms," which continued the trend of expanding the waiver doctrine for nonjurisdictional procedural defects in panel composition and the referral stage,

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1. *See* Major Bradley J. Huestis, *You Say You Want a Revolution: New Developments in Pretrial Procedures*, ARMY LAW., Apr./May 2003, at 17 [hereinafter Huestis, *Revolution*]; Major Bradley J. Huestis, *New Developments in Pretrial Procedures: Evolution or Revolution?*, ARMY LAW., Apr. 2002, at 20 [hereinafter Huestis, *Evolution*].

2. *Id.*; *see also* NATIONAL INSTITUTE OF MILITARY JUSTICE, REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE, May 2001, *available at* http://www.badc.org/html/militarylaw_cox.html.

3. *See* UCMJ art. 25 (2002); *see also generally* Major Guy P. Glazier, *He Called for His Pipe and He Called for His Bowl, and He Called for His Members Three—Selection of Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998); Major Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190 (2003).

4. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1102(b)(2) (2002) [hereinafter MCM].

5. 58 M.J. 117 (2003).

6. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGE'S BENCHBOOK (15 Sept. 2002) [hereinafter BENCHBOOK].

7. 59 M.J. 410 (2004).

as well as a decision on the limits of the special court-martial convening authority's (SPCMCA) referral power, which bucked the waiver trend. Meanwhile, the ACCA weighed in on a long time Army practice regarding referral to a special court-martial "empowered to adjudge a bad-conduct discharge."

In two additional courts-martial personnel cases, the CAAF strongly affirmed the fundamental right to counsel. One instance involved the right to civilian counsel; the other, the right to conflict-free counsel. While affirming the right to counsel in both cases, the CAAF set aside the findings and sentence in both due to a denial of that right.

Both the CAAF and a service court issued opinions affirming the expansive post-trial powers of the military judge. Finally, the Supreme Court issued two opinions that may be applicable to military practice: one concerns recusal of the judge; the other concerns the advice constitutionally required for a defendant who desires to proceed *pro se* in a guilty plea.

Convening Authority

When the convening authority selects the members of a court-martial panel under the provisions of Article 25, Uniform Code of Military Justice (UCMJ),[8] instructions accompanying the selection of the primary and alternate members often provide automatic provisions that take effect when, for example, the accused chooses a panel of at least one-third enlisted members versus a panel of all officer members. These automatic instructions may be contained on the convening order, in the Staff Judge Advocate's (SJA) instructional memorandum concerning panel selection which is adopted by the convening authority, or both. The automatic trigger would be activated after an accused requests a panel of one-third enlisted members. Under such a circumstance, officer members are relieved for duty and enlisted members are automatically detailed in their place.

In its last term, the CAAF faced the issue of potential errors in these automatic "triggering mechanisms" or "bump-up provisions." In *United States v. Mack*,[9] a memorandum by the SJA, approved by the convening authority, concerning operation of a convening order, provided that when the accused requested a panel of at least one-third enlisted members, alternate enlisted members would be automatically detailed without further action by the convening authority if, among other triggering mechanisms, "before trial, the number of enlisted members . . . falls below one-third plus two."[10] The convening order initially listed six officer and six enlisted members.[11] Three members were excused (one enlisted and two officers), leaving four officer and five enlisted members. After the military judge called the court-martial to order, the trial counsel announced eleven names of persons detailed to the court-martial, which included two enlisted members from the convening order's list of alternates. The appointment of the two additional enlisted members appeared inconsistent with the triggering mechanism because the number of enlisted members was not below "one-third plus two" without them, however the defense did not object or "make any inquiries regarding the presence of [the two additional enlisted members] or the excusal of the other members."[12]

The ACCA remanded on its own for a *Dubay*[13] hearing concerning the presence of the additional two enlisted members. The hearing revealed that "no documentary evidence could be located concerning the excusal of the three original members or" the addition of the two enlisted members.[14] The ACCA concluded that "it was the Government's burden to demonstrate that the court-martial was properly composed and that the Government had not met its burden in this case . . . the military judge concluded that the court-martial lacked jurisdiction."[15] The ACCA nonetheless affirmed Specialist Mack's conviction in a *per curiam* opinion, ruling that although "there is no clear explanation as to how either [additional enlisted member] came to sit on appellant's court-martial . . . [t]heir presence as members does not constitute jurisdictional error."[16]

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8. UCMJ art. 25. The convening authority personally selects the panel members applying the criteria set forth in Article 25: age, education, training, experience, length of service, and judicial temperament. *Id.*

9. 58 M.J. 413 (2003).

10. *Id*. at 415.

11. *Id.*

12. *Id.*

13. United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).

14. Mack, 58 M.J. at 415.

15. *Id.* at 416.

16. *Id*. at 416 (citing United States v. Mack, Army No. 9900146, slip op. at 2 n.* (Army Ct. Crim. App. May 16, 2002) (unpublished)).

The CAAF affirmed and held the following:

> When a convening authority refers a case for trial before a panel identified in a specific convening order, and the convening order identifies particular members to be added to the panel upon a triggering event, the process of excusing primary members and adding the substitute members involves an administrative, not a jurisdictional matter. Absent objection, any alleged defects in the administrative process are tested for plain error.[17]

The CAAF found no error at all.[18] "Excusal of one officer and one enlisted member prior to the excusal of the other officer would have reduced the panel to ten members, five of whom were officers and five of whom were enlisted."[19] This triggered the one-third plus two triggering event. Even if there was an error in the triggering event, so long as the members were listed on the convening order and the panel met the one-third requirement, "any error in the operation of the triggering mechanism was administrative, not jurisdictional," and the appellant suffered no prejudice.[20]

In *Mack*, the CAAF continued the long-standing trend of placing substance over form when reviewing non-jurisdictional procedural defects in panel composition and referral.[21] The root of this trend is, as Judge Sullivan once stated, "Fairness and common sense, not technicalities, should rule the law."[22] The CAAF bucked the trend in *United States v. Henderson*,[23] and set aside the findings and sentence due to a defective referral. In *Henderson*, the SPCMCA referred an allegation of willfully hazarding a vessel in violation of Article 110(a), UCMJ,[24] a nonmandatory capital offense. This referral was in violation of Article 19, UCMJ, which provides that a SPCMCA may in general only refer noncapital offenses.[25] An exception to this general rule is that the SPCMCA can refer nonmandatory capital offenses as noncapital "under such regulations as the President may prescribe."[26] The President, in Rule for Court-Martial (RCM) 201(f)(2)(c), authorized the SPCMCA to refer a nonmandatory capital offense in two instances: (1) when permitted by the General Court-Martial Convening Authority (GCMCA); or (2) when authorized by regulations of the Secretary concerned.[27] Permission from the GCMCA was neither sought nor granted in this case, and there was no service regulation that purported to grant the authority for the referral in this case.[28] The Navy-Marine Court of Criminal Appeals (NMCCA) held that the error was non-jurisdictional, as the appellant ultimately entered into a pretrial agreement and pled guilty to a noncapital lesser-included offense of negligently hazarding a vessel.[29] The NMCCA reasoned that by accepting the pretrial agreement, the SPMCA in effect amended his original referral decision and substituted a referral to the lesser-included offense.[30]

The CAAF reversed, holding the referral was a jurisdictional error that necessitated setting aside the findings and sentence in the case.[31] Applying a *de novo* standard of review,[32] the CAAF rejected three government arguments: first, that the error was a

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17. *Id*. at 417 (citing United States v. Cook, 48 M.J. 434, 436 (1998) (stating that any error in SJA excusing more than one-third of members detailed in violation of MCM, RCM 505(c)(1)(B)(ii) was waived and did not amount to plain error)).

18. *Id*. at 417.

19. *Id*.

20. *Id*. at 418.

21. *See, e.g*., cases cited *infra* note 43.

22. United States v. Townes, 52 M.J. 275, 277 (1999) (Sullivan, J., concurring), *cert. denied*, 531 U.S. 821 (2000).

23. 59 M.J. 350 (2004).

24. UCMJ art. 110(a) (2002). It states, in pertinent part: "Any person subject to this chapter who willfully and wrongfully hazards or suffers to be hazarded any vessel of the armed forces shall suffer death or such other punishment as a court-martial may direct." *Id*.

25. *Id*. art. 19. Article 19 states, in pertinent part: "Subject to section 817 of this title (article 17), special courts-martial have jurisdiction to try persons subject to this chapter for any noncapital offense made punishable by this chapter and, under such regulations as the President may prescribe, for capital offenses." *Id*.

26. *Id*.

27. *Henderson*, 59 M.J. at 352; MCM, *supra*, note 4, R.C.M. 201.

28. *Henderson*, 59 M.J. at 352.

29. United States v. Henderson, No. 200101752, 2003 CCA LEXIS 48, *5-6 (N-M Ct. Crim. App. Feb. 27, 2003) (unpublished).

30. *Id*. at *6 (citing United States v. Wilkins, 29 M.J. 421, 424 (C.M.A. 1990)).

31. *Henderson*, 59 M.J. at 353.

nonjurisdictional procedural defect, and that the so-called "evolution" in the law applicable to jurisdictional defects extends to this situation;[33] second, that the pretrial agreement was a functional equivalent of a referral of a noncapital lesser-included offense;[34] and third, that the referral of the nonmandatory capital offense was also an implicit referral of the noncapital lesser-included offense.[35]

As to the evolution argument, the court found that even if there were "some form of 'evolution' in the law applicable to jurisdictional defects in the referral process, that evolution did not extend so far as to alter the logic and holding in [*United States v.*] *Bancroft*,"[36] which the court found dispositive. In *Bancroft*, the CAAF's predecessor, the Court of Military Appeals (CMA), set aside the appellant's findings and sentence at a special court-martial for a violation of Article 113, UCMJ, for sleeping at his post. Although the offense is punishable by death during time of war, the charges were referred to a special court-martial during wartime in violation of Article 19.[37] The NMCCA distinguished *Bancroft* because in that case, the accused was found guilty of the capital offense, whereas in *Henderson* the accused pled guilty and was found guilty of a noncapital lesser-included offense.[38] The CAAF did not discuss this arguably crucial difference, and relied instead on the "strikingly similar" commonalities between the two cases.[39] "As in *Bancroft*, the officer making the referral here exercised only special court-martial jurisdiction and referred a capital charge to a special court-martial without the authorization to do so."[40] The court, therefore, lacked jurisdiction over the offense.[41]

Chief Judge Crawford dissented, arguing "the convening authority's derivatively defective referral of the lesser-included charge constituted waivable, nonjurisdictional error, which not only failed to prejudice the accused, but actually benefited him."[42] Chief Judge Crawford relied on a laundry list of cases characterizing defective referrals as nonjurisdictional errors, as well as case law finding these errors waived when not raised at trial.[43] The Chief Judge declined to follow *Bancroft* for two reasons: first, "the more recent trend by this Court . . . is to treat referral defects as waivable, nonjurisdictional error";[44] and two, in *Bancroft*, the accused was convicted of the referred capital offense, but in *Henderson*, the accused was convicted of a noncapital lesser-included offense, albeit by a "derivatively defective referral."[45] In light of the trend convincingly recounted by Chief Judge Crawford, and manifested once again in *Mack*, it is hard to argue with the dissent's logic.

In the service courts, one additional case is worth mentioning in the area of the convening authority's referral decision. *United States v. Scott*[46] examined the long-time Army practice of annotating the back of a charge sheet upon referral to indicate that a special court-martial is "empowered to adjudge a bad-conduct discharge." This annotation distinguishes those spe-

32. *Id*. at 351-52.

33. *Id*. at 352-53.

34. *Id*. at 353-54.

35. *Id*. at 354.

36. *Id*. at 353 (citing United States v. Bancroft, 11 C.M.R. 3 (C.M.A. 1953)).

37. *Bancroft*, 11 C.M.R. at 3.

38. United States v. Henderson, No. 200101752, 2003 CCA LEXIS 48, *3-4 (N.M. Ct. Crim. App. Feb. 27, 2003) (unpublished).

39. *Henderson*, 59 M.J. at 353.

40. *Id*.

41. *Id*.

42. *Id*. at 355 (Crawford, C.J., dissenting).

43. *Id.* (Crawford, C.J., dissenting) (citing United States v. King, 28 M.J. 397, 399 (C.M.A. 1989) ("It is well established that a defective referral . . . does not constitute jurisdictional error."); United States v. Kohut, 44 M.J., 245, 250 (1996) (providing nonjurisdictional error when case was referred following trial in state court without approval of The Judge Advocate General); United States v. Hayward, 47 M.J. 381, 383 (1998) (stating that post-arraignment referral of additional charge is nonjurisdictional error); United States v. Jeter, 35 M.J. 442, 446 (C.M.A. 1992) (stating that convening authority who is accuser and prohibited from referring charges who nonetheless referred charges is nonjurisdictional defect); United States v. Joseph, 11 M.J. 333, 335 (C.M.A. 1981) (stating that nonjurisdictional errors including defective referrals are waived unless raised at trial); United States v. Lopez, 200 C.M.A. 76, 78, 42 C.M.R. 268, 270 (A.C.M.R. 1970) (stating that guilty plea "waives all nonjurisdictional defects in all earlier stages of the proceedings against an accused")).

44. *Id.* at 356 (Crawford, C.J., dissenting).

45. *Id*. (Crawford, C.J., dissenting).

46. 59 M.J. 718 (Army Ct. Crim. App.), *petion denied*, _ M.J. _ (2004) (CAAF LEXIS 468 (2004).

cial courts-martial that may adjudge a bad-conduct discharge (BCD) as part of the sentence from those that may not. The latter special court-martial has historically been referred to as a "straight special," while the former has historically been referred to as a "BCD Special."

In *Scott*, the GCMCA signed a memorandum that referred the charges and specifications to a special court-martial "empowered to adjudge a bad-conduct discharge."[47] The instructions on the charge sheet reflecting the referral, however, stated only that the case was "[r]eferred for trial to the special court-martial," and did not include the traditional annotation "empowered to adjudge a bad-conduct discharge."[48] While no objection was raised at trial, appellate defense counsel asserted that because the charge sheet lacked the traditional language that the special court-martial was "empowered to adjudge a bad-conduct discharge," the court lacked the authority to impose one.[49]

The ACCA wisely rejected this assertion. Based on the discussion following RCM 601(e)(1), the ACCA determined that additional words in the convening authority's referral or on the charge sheet are "surplusage."[50]

> We hold that all Army SPCMs are empowered to adjudge a BCD unless the convening authority expressly states that a particular SPCM is not so empowered. The convening authority should expressly state such a limitation in the referral signed by the convening authority, in special instructions on the charge sheet, or both.[51]

Scott provides practitioners with answers to two remaining issues following the 2002 amendment to *Army Regulation 27-10* that removed a service-specific limit on the SPCMCA's authority to refer a special court-martial empowered to adjudge a BCD.[52] Before the amendment, the Secretary of the Army did not permit the SPCMCA to refer a special court-martial empowered to adjudge a BCD. Following the amendment, a question arose as to whether the straight special court-martial still existed. After *Scott*, Army practitioners know that the straight special still exists and that the default referral is a special court-martial empowered to adjudge a BCD, unless that authority is specifically limited by the convening authority.

Counsel

The CAAF decided two cases so far this term concerning the right to counsel. In both, the CAAF found a denial of the right and set aside the findings and sentence. In the first, *United States v. Wiest*,[53] the CAAF held that the military judge abused his discretion in denying a defense request for delay to obtain civilian counsel.[54] Cadet Wiest, a student at the Air Force Academy, was charged under Article 134, UCMJ, for unlawfully damaging a computer.[55] "[C]ontrary to United States Air Force Academy (USAFA) rules, Appellant attempted to use his computer to access internet chat rooms. To prevent such communications, USAFA had previously developed a firewall as part of the USAFA network."[56]

On the originally scheduled trial date, 2 February, defense counsel moved for a new pretrial investigation under Article 32, UCMJ, "arguing that the Government mistakenly told defense counsel that logs describing individuals at USAFA who had entered and exited the firewall did not exist."[57] In discuss-

47. *Id*. at 719.

48. *Id*.

49. *Id*.

50. *Id*. at 720. The discussion to RCM 601(e)(1) states:

> The convening authority should acknowledge by an instruction that a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, may not be adjudged when the prerequisites under Article 19 will not be met. See R.C.M. 201(f)(2)(B)(ii). For example, this instruction may be given when a court reporter is not detailed.

Id. at 719 (quoting MCM, *supra* note 4, R.C.M. 601(e)(1) (Discussion)).

51. *Id*. at 720.

52. U.S. DEPT' OF ARMY, REG. 27-10, LEGAL SERVICES, MILITARY JUSTICE para. 5-27b (6 Sept. 2002); *see* Huestis, *Revolution*, *supra* note 1, at 21.

53. 59 M.J. 276 (2004).

54. *Id*. at 276.

55. *Id*.

56. *Id*. at 277.

57. *Id*.

ing the motion with the defense counsel, the military judge "made several comments questioning the competency of the defense counsel for relying on the Government's assertion that these logs did not exist, and for not independently investigating the existence of the logs."[58] Incredibly, the military judge told the defense counsel that he "should have assumed the records were always present" and that the government, contrary to its representation, had "misinformed" the defense otherwise.[59] When defense counsel responded "that they assumed the government was telling the truth," the judge replied, "[A] competent advocate assumes nothing."[60]

Following the military judge's comments, Cadet Wiest "requested new defense counsel."[61] The military judge attempted to dissuade the accused, stating he "misunderstood" his prior remarks; however, Cadet Wiest "insisted on new counsel" and the military judge relented.[62] The military judge emphasized that new counsel must be prepared for trial by a newly scheduled trial date, thirty-four days later—8 March.[63] The accused's requested and approved Individual Military Counsel was not available on the scheduled trial date. The military judge stated, "The trial will proceed without him."[64] Approximately one week after the hearing on the motion for a new article 32 investigation, the accused hired a civilian defense counsel, who entered an appearance and requested a trial delay until 19 April—an additional six weeks beyond the 8 March trial date. The military judge denied the request.[65]

The accused requested new military defense counsel on the day of the trial, 8 March, who represented him throughout the trial.[66] The civilian counsel was not ready to begin due to other commitments.[67] The appellant was convicted and sentenced to a dismissal and total forfeitures; the convening authority approved the dismissal and partial forfeitures and the Air Force Court of Criminal Appeals (AFCCA) affirmed the findings and sentence.[68]

The CAAF reversed. "It should . . . be an unusual case, balancing all the factors involved, when a judge denies an initial and timely request for a continuance in order to obtain civilian counsel, particularly after the judge has criticized appointed military counsel."[69] Applying the factors set forth in *United States v. Miller*,[70] including surprise, the timeliness of the request, other continuance requests, the good faith of the moving party, and prior notice, the court found the trial judge's "inelastic attitude in rescheduling" the trial was an abuse of discretion particularly when the "request was predicated on the judge's negative comments about Appellant's original military counsel and Appellant's subsequent selection of a new civilian counsel."[71]

In one sense, the CAAF's decision in *Wiest* should come as no surprise. In *Miller*, the 1997 case chiefly relied upon by the CAAF in *Wiest*, the court also found that the military judge abused his discretion by failing to grant a continuance

58. *Id*.

59. *Id*.

60. *Id*. While not cited or commented upon in the court's opinion, the judge's comments to the defense run afoul of the Supreme Court's recent statements in *Banks v. Dretke*, 124 S. Ct. 1256, 1275, 1276 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process . . . It was not incumbent on Banks to prove [the prosecutor's] representations false; rather, Banks was entitled to treat the prosecutor's submissions as truthful."). Although *Banks* dealt with the state's failure to provide exculpatory information, which is not alleged in *Wiest*, the basic point is beyond dispute: when the government represents that certain evidence does not exist, the defense is entitled to rely on that representation; it is not incumbent upon the defense to disprove the government's representation. Further, although the *Banks* decision was released after Cadet Wiest's trial, the Supreme Court's sentiments are not new or novel. *See* Strickler v. Greene, 527 U.S. 263 (1999). The Court has also underscored the "special role played by the American prosecutor in the search for truth in criminal trials." *Id.* at 281; *accord*, Kyles v. Whitley, 514 U.S. 419, 439-440 (1995); United States v. Bagley, 473 U.S. 667, 675 n.6 (1985); Berger v. United States, 295 U.S. 78, 88 (1935); *see also* Olmstead v. United States, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting).

61. *Wiest*, 59 M.J. at 277.

62. *Id*. at 278.

63. *Id*.

64. *Id*.

65. *Id*.

66. *Id*.

67. *Id*.

68. *Id*. at 276.

69. *Id*. at 278.

70. 47 M.J. 352 (1997).

71. *Wiest*, 59 M.J. at 278-79.

requested by civilian counsel retained by the accused.[72] *Miller*, relied upon older, established case law holding that, "Although the right to civilian counsel 'is not absolute, . . . an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel."'[73] Chief Judge Crawford delivered the opinions in both *Miller* and *Wiest.* In addition, in between *Miller* and *Wiest* the CAAF decided *United States v. Weisbeck*.[74] *Weisbeck* is another case in which the court found the military judge abused his discretion by failing to grant a delay to obtain expert testimony. Similar to the facts in *Wiest*, the requested delay in *Weisbeck* was for approximately six weeks.[75]

Judge Erdmann dissented in *Wiest*, however, pointing out that the military judge granted Cadet Wiest a delay of thirty-four days to find counsel of his choice—the period from the initial decision to replace his original military counsel on 2 February until the newly scheduled trial date of 8 March. In Judge Erdmann's view, the case came down to this: "A defendant's qualified right to counsel does not extend to an inflexible insistence on a specific attorney who cannot comply with the court's reasonable schedule."[76] Moreover, because Cadet Wiest had two able military attorneys defending him, there was no prejudice by the military judge's denial of a continuance to obtain his civilian counsel of choice.[77]

Under other circumstances, Judge Erdmann's dissent might prevail; however, clearly the majority was bothered by the military judge's pejorative comments toward the original defense counsel. Those comments resulted in the request for new counsel and led to retaining of civilian counsel, who requested the delay at issue. In addition, the government demonstrated no prejudice from the requested delay and also did not demonstrate that the defense was merely trying to "vex" the government.[78] In fact, the government could hardly complain, as it was the government's "misinformation" to the defense concerning the lack of firewall logs that caused the situation in the first place. This confluence of circumstances may limit *Wiest* to its specific facts.

Another case that may be limited to its specific facts is the second case thus far this term concerning the right to counsel, *United States v. Cain*,[79] wherein the CAAF, as in *Wiest*, set aside the findings and sentence. Following his guilty plea and sentencing for two specifications of indecent assault,[80] Sergeant Cain's parents alleged that his lead trial defense counsel "had pressured the Appellant for sexual favors." [81] One day after being informed of the allegations, the defense counsel committed suicide.[82] The appellant's co-counsel disqualified himself from further representation of the appellant and new counsel was detailed to represent him post-trial.[83]

The newly detailed defense counsel submitted numerous requests, all of which were denied, seeking information about the trial representation of the appellant and the lead counsel's subsequent suicide.[84] In her post-trial matters, the defense continued to object "to the Government's refusal to release information regarding the events surrounding [the lead defense counsel's] suicide. In addition, the defense contended that appellant had not received effective assistance of counsel and that the deficiencies in representation rendered the guilty pleas improvident."[85] The defense requested a new trial and pro-

72. *Miller*, 47 M.J. at 359.

73. *Id*. at 358 (quoting United States v. Thomas, 22 M.J. 57, 59 (C.M.A. 1986) (internal quotation marks omitted) (quoting Morris v. Slappy, 461 U.S. 1, 11-12 (1983) (quoting Ungar v. Sarafite, 376 U.S. 575 (1964))).

74. 50 M.J. 461 (1999).

75. *Id*. at 465.

76. *Wiest*, 59 M.J. at 282 (Erdmann, J., dissenting).

77. *Id*. at 283 (Erdmann, J., dissenting).

78. *Id*. at 279.

79. 59 M.J. 285 (2004).

80. 10 U.S.C. § 934 (2000). Sergeant (SGT) Cain was originally charged with three specifications of forcible sodomy. Pursuant to his pleas, SGT Cain agreed to plead guilty to two specifications of indecent assault in exchange for a twenty-four month confinement cap. The military judge sentenced SGT Cain, *inter alia*, to five years confinement and a dishonorable discharge. *Cain*, 59 M.J. at 285-86.

81. *Id*. at 288.

82. *Id*.

83. *Id*.

84. *Id*. Defense counsel submitted a request for discovery, or in the alternative, for an in camera inspection of relevant evidence by the military judge. Both were denied. *Id*. Next, defense counsel requested the convening authority to order a post-trial session under Article 39(a), UCMJ. Following the SJA's recommendation, the convening authority denied the request. *Id*.

posed various alternative remedies, which the convening authority denied.[86] One of the lessons of *Cain* is that the blind refusal of the SJA and the convening authority to hold a hearing was singularly unhelpful in resolving the issues surrounding the appellant's representation. As the old adage goes, "Bad news does not get better with time."

Two years after the convening authority's action, the ACCA ordered a further evidentiary hearing into the matter pursuant to *United States v. Dubay*.[87] At the *Dubay* hearing, the military judge found that SGT Cain and his lead defense counsel engaged in a consensual sexual relationship throughout the period of the defense counsel's representation. The military judge concluded that the relationship "played no role in Appellant's decision to enter guilty pleas, and that it did not create a conflict of interest."[88] The ACCA affirmed the findings and sentence, and found further that SGT Cain waived any conflict of interest when he declined to follow the advice of two civilian attorneys, who both counseled him to sever the attorney-client relationship with his lead defense counsel.[89]

The CAAF reversed, finding that the "volatile mixture of sex and crime in the context of the military's treatment of fraternization and sodomy as criminal offenses"[90] resulted in a "uniquely proscribed relationship" that was "inherently prejudicial and created a *per se* conflict of interest in counsel's representation of the Appellant."[91] Finding ineffective assistance of counsel under the Sixth Amendment, the court set aside the findings and sentence.[92]

It is difficult to imagine that the peculiar facts and circumstances in *Cain* will be repeated. As the court described it:

> [W]e confront a course of conduct involving an attorney's abuse of a military office, a violation of the duty of loyalty, fraternization, and repeated commission of the same criminal offense for which the attorney's client was on trial. All of this is left unexplained due to the attorneys' untimely death.[93]

Accordingly, *Cain's* precedential value, and in particular the CAAF's finding of an inherently prejudicial *per se* conflict of interest, is most likely limited to its facts.

Military Judge

There are two recent decisions, including one from the Supreme Court, that discuss the issue of recusal of a trial judge. In addition, two new cases discuss the post-trial authority of the military judge—one sounding a warning concerning "Bridge-the-Gap" sessions, the post-trial "after action report" that a military judge may engage in with counsel from both sides.

A military judge "shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned."[94] "This subsection is, except for changes in terminology, identical to" its federal counterpart, 28 U.S.C. § 455(a).[95] In a *per curiam* decision in *Sao Paulo v. American Tobacco Co., Inc.*,[96] the Supreme Court held that a trial judge was not disqualified under 28 U.S.C. § 455(a) when that judge's name appeared on a motion to file an *amicus* brief in a similar suit against some of the same companies. The Court reversed the lower court's opinion as inconsistent with *Liljeberg v. Health Services Acquisition Corps.*,[97] which held that §455(a) (and RCM 902(a)) requires recusal only when "a

85. *Id*. at 289.

86. *Id.* The defense suggested three alternative remedies: issuance of an administrative discharge in lieu of approval of the findings and sentence; a post-trial session under Article 39(a), UCMJ; and a request for clemency by approval of time served. *Id.*

87. 37 C.M.R. 411 (C.M.A. 1967); *see Cain*, 59 M.J. at 289.

88. *Cain*, 59 M.J. at 292.

89. *Id*.

90. *Id*. at 295.

91. *Id*.

92. *Id*. at 296.

93. *Id.* at 295.

94. MCM, *supra* note 4, R.C.M. 902(a).

95. *Id*. R.C.M. 902(a) analysis at A21-51.

96. 535 U.S. 229 (2002).

97. 486 U.S. 847 (1988).

reasonable person, knowing all the circumstances, would have expected that the judge would have actual knowledge of his interest or bias in the case."[98] The lower court did not consider "all the circumstances," specifically that the judge's name was apparently added to the brief in error and that he played no part in its preparation. As such, the Supreme Court reversed and remanded for further proceedings consistent with its opinion.

The CAAF faced a related situation two terms ago in *United States v. Jones*.[99] In *Jones*, the court faced the issue of whether an appellate judge on the NMCCA who formerly served as the Director of the Navy-Marine Appellate Government Division should have recused himself from appellate review of the appellant's case.[100] During his tenure as Director, the Navy-Marine Appellate Government Division opposed two defense requests for additional time to file its brief before the service court.[101] As in *Sao Paulo*, the judge in *Jones* had no actual prior involvement in the case in question.[102] The government's opposition to the defense motions was "perfunctory and mechanical."[103] Accordingly, the CAAF held that the judge's role did "not create a reasonable question about [his] lack of impartiality."[104] Despite finding no reason for recusal under the facts presented, the CAAF advised that in the future, such issues could be avoided if "judges appointed to the lower courts after prior appellate division service would recuse themselves from all cases that were pending during their tenure in the division."[105]

This year, the AFCCA once again faced a recurring recusal issue: should the military judge recuse herself when the accused withdraws his guilty plea after a full providency inquiry? Further, does the failure to recuse herself mean that the accused is denied his right to select trial by military judge alone? In *United States v. Dodge*,[106] the court answered both questions in the negative.

After a 248-page providency inquiry but before the military judge's acceptance of the accused's guilty plea, Captain Dodge withdrew his pleas.[107] After a sixty-day delay, the defense notified the military judge that the accused would enter a guilty plea to some of the charged offenses and then challenged the judge for bias due to her prior participation in the guilty plea.[108] The defense also alleged that due to the military judge's exposure to the providence inquiry, the accused could no longer choose trial by military judge alone and, therefore, selected trial by members for the contested portions of the trial.[109] The military judge denied the defense challenge and refused to recuse herself.[110] Thereafter, the accused entered substantially the same pleas as he originally entered, albeit without a stipulation of fact and in the absence of a pretrial agreement.[111] The accused also acknowledged that his pleas of guilty waived the recusal issue as to those pleas.[112] Following a trial on the contested charges, the accused was convicted and sentenced to fifteen years confinement, a dismissal, and total forfeitures.[113] The initial pretrial agreement in the case limited confinement to five years.[114]

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98. *See* United States v. Mitchell, 39 M.J. 131, 143 (C.M.A.), *cert. denied*, 513 U.S. 874 (1994) (stating that the test for determining whether recusal is necessary under 28 U.S.C. § 455(a) is "whether a reasonable person *who knew all the facts* might question these appellate military judges' impartiality").

99. 55 M.J. 317 (2001). *See also* United States v. Lynn, 54 M.J. 202 (2000) (holding recusal not required in similar case involving same appellate judge).

100. *Id.* at 318.

101. *Id.*

102. *Id.* at 320.

103. *Id.*

104. *Id.*

105. *Id.* at 321.

106. 59 M.J. 821 (A.F. Ct. Crim. App. 2004).

107. *Id.* at 823.

108. *Id.* at 824.

109. *Id.*

110. *Id.*

111. *Id.* at 825.

112. *Id.* at 824.

113. *Id.* at 822.

114. *Id.*

According to the AFCCA, "The gravamen of the appellant's argument at trial was the assertion that the military judge's continued participation denied him his right of forum selection. He averred that, but for her refusal to recuse herself, he would have selected trial before military judge alone."[115] Dispensing with this allegation, the AFCCA ruled that because the appellant never made a request for trial by military judge alone, the military judge could not have abused her discretion in failing to grant it.[116] Moreover, the AFCCA rejected the accused's allegation that the military judge should have disqualified herself due to her participation in the first providence inquiry for two reasons: first, the issue was waived on the record; and second, unlike a case in which pleas are rejected after the accused incriminates himself and then proceeds to trial, here the accused

> ultimately entered pleas of guilty that were substantially the same as his initial pleas. We simply fail too see any compelling logic in the assertion that, having heard the appellant explain in court his criminal conduct, the military judge was disqualified from hearing him explain it to her a second time.[117]

The AFCCA's opinion is consistent with CAAF case law in this area, which has long held that a military judge is not *per se* disqualified from continuing to preside over a case in which the accused's guilty plea is either rejected or withdrawn prior to findings.[118] The Army, however, "has expressed a preference for recusal in such cases, and if the accused elects to continue before the same trial judge, the military judge should obtain a waiver from the accused."[119] In *Dodge*, the AFCCA continued to expressly reject the Army's approach.[120]

Sao Paulo and *Dodge* remind practitioners that, although a judge should recuse himself when circumstances warrant, the courts will examine *all* the facts to determine whether the military judge has abused his or her discretion by failing to do so. The courts will uphold the military judge's decision not to recuse absent an abuse of discretion based on the circumstances.

In the area of the military judge's authority, the ACCA's opinion in *United States v. Chisholm*,[121] affirmed by the CAAF this term in the face of a government appeal, could signal an era of vastly increased judicial involvement in the post-trial process. Certainly, the opinion gives military judges the green light to do so. *Chisholm* appeared to initially involve yet another instance of dilatory post-trial processing[122]—in this case, sixteen months from adjournment to convening authority action to prepare an 848-page record.[123] The ACCA went beyond awarding relief for the delay by subtracting three-months confinement off of a four-year sentence.[124] Finding that "[m]ilitary judges, as empowered by Congress and the President, have both a duty and a responsibility to take active roles in 'directing' the timely and accurate completion of court-martial proceedings,"[125] the court set forth a four-part recipe for oversight.[126]

"After adjournment, but prior to authentication of the record of trial, the military judge must ensure that the government is proceeding with due diligence to complete the record of trial as expeditiously as possible, given the totality of the circumstances of that accused's case."[127] "In most cases, if a military judge has not received a record of trial within 90-120 days after adjournment, he should *sua sponte* make documented inquires [sic] as to the progress of the record preparation and the projected completion thereof."[128] If at that point, or at any other

115. *Id*. at 825.

116. *Id*.

117. *Id*. at 826.

118. *See* United States v. Winter, 35 M.J. 93, 95 (C.M.A. 1992) (recognizing that "even though a judge is not *per se* disqualified from presiding over a bench trial after rejecting guilty pleas, the facts of a particular case may still require recusal of the military judge, especially if the judge has formed an intractable opinion as to the guilt of the accused") (citation omitted); *see also* United States v. Bray, 49 M.J. 300 (1998).

119. United States v. Rhule, 53 M.J. 647, 654 (Army Ct. Crim. App. 2000) (citing United States v. Cockrell, 49 C.M.R. 567 (A.C.M.R. 1974)).

120. *Dodge*, 59 M.J. at 825, n.9 (citing United States v. Melton, 1 M.J. 528, 51 C.M.R. 176 (A.F.C.M.R. 1975)).

121. 58 M.J. 733 (Army Ct. Crim. App.), *aff'd*, 59 M.J. 151 (2003).

122. *See* United States v. Garman, 59 M.J. 677, 683 (Army Ct. Crim. App. 2004) and cases cited therein in Appendix A.

123. *Chisholm*, 58 M.J. at 735, 736.

124. *Id*. at 739.

125. *Id*. at 737.

126. *Id*. at 737-38.

127. *Id*. at 738.

point prior to authentication of the record of trial, "the military judge determines that the record preparation is proceeding too slowly, he may take remedial action without awaiting an order from the intermediate appellate court."[129]

> The exact nature of the remedial action is within the sound judgment and broad discretion of the military judge, but could include, among other things: (1) directing a date certain for completion of the record with confinement credit or other progressive sentence relief for each day the record completion is late; (2) ordering the accused's release from confinement until the record of trial is completed and authenticated; or, (3) if all else fails, and the accused has been prejudiced by the delay, setting aside the findings and the sentence with or without prejudice as to a rehearing. Staff judge advocates and convening authorities who disregard such remedial orders do so at their peril.[130]

The government certified the ACCA's decision to CAAF, alleging that, *inter alia*, the remedial actions described constituted an advisory opinion.[131] The government "focus[ed] solely on that portion of the opinion below concerning alternative means of addressing post-trial delays, with particular emphasis on the role of the military judge in post-trial processing."[132] The CAAF rejected the government's assertion, holding that the ACCA had jurisdiction to review the case, and "was presented with a concrete dispute between adverse parties . . . regarding the appropriateness of the sentence in light of unreasonable post-trial delay."[133] The CAAF, however, noted parenthetically that "[t]he parties in a subsequent case are free to argue that specific aspects of an opinion . . . should be treated as non-binding dicta."[134]

Dicta, constitutes the majority of the ACCA's opinion– "expressions in [the] court's opinion which go beyond the facts before [the] court and therefore are individual views of [the] author of [the] opinion and not binding in subsequent cases as legal precedent."[135] As Groucho Marx once famously stated, "A child of five could understand this. Get me a child of five."[136] Whether or not the ACCA's comments are *dicta* is arguably beside the point. A published opinion of the Army court acknowledged that it expects military judges to manage the post-trial process. The court also provided several options for the military judge to pursue when the government's post-trial processing of a case is dilatory, up to and including release of the accused from confinement and, in extraordinary cases, setting aside the findings and sentence.[137] United States Army SJAs are on clear notice of the court's thinking in this area, and ignore *Chisholm's dicta* at their peril.

In *United States v. Lepage*,[138] the NMCCA also faced the issue of the military judge's post-trial authority, but in an entirely different context. Like the ACCA in *Chisholm*, however, the NMCCA in *LePage* subscribed to an expansive view of the military judge's authority in the interim period from adjournment to authentication of the record of trial. In *Lepage*, the military judge erroneously admitted a record of a prior proceeding under Article 15, UCMJ into evidence during the presentencing proceeding.[139] In a post-trial session held under the provisions of Article 39(a), UCMJ, the military judge determined that admitting the exhibit was erroneous and that the court considered the erroneously admitted exhibit in arriving at a sentence, including the adjudged BCD, to the prejudice of the accused.[140] Relying on RCM 1009(a), however, which limits reconsideration of a sentence to "any time such sentence is announced in open session of the court,"[141] the military judge failed to take corrective action during that hearing.[142] Instead, the military judge recommended the convening authority disapprove the adjudged BCD. The convening authority declined to follow the military judge's recommendation.

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128. *Id*. at 737-38.

129. *Id*. at 738.

130. *Id*. at 738-39 (citation and footnotes omitted).

131. United States v. Chisholm, 59 M.J. 151, 152 (2003).

132. *Id*.

133. *Id.*

134. *Id*. (citing United States v. Campbell, 52 M.J. 386, 387 (2000)).

135. Black's Law Dictionary 454 (6th ed.1990).

136. Working Humor.com, Humorous Quotes Attributed to Grouch Marx, *available at* http://www.workinghumor.com/quotes/groucho_marx.shtml (last visited Apr. 9, 2004).

137. United States v. Chisholm, 58 M.J. 733, 738-39 (Army Ct. Crim. App. 2003).

138. 59 M.J. 659 (N-M. Ct. Crim. App. 2003).

The NMCCA held that "[t]his case should not even be before us for review . . . . [T]he military judge had the authority under RCM 1102(b)(2) to take corrective action."[143] Rule for Court-Martial 1102(b)(2) authorizes a military judge to resolve any matter which arises after trial and substantially affects the legal sufficiency of any findings of guilty or the sentence.[144] The specificity of that section, stated the NMCCA, takes precedence over the more general language of the reconsideration provisions of RCM 1009.[145] Finding that "[p]lain error leaps from the pages of this record,"[146] and after chastising the convening authority for failing to follow the military judge's recommendation to set aside the BCD, the NMCCA did not approve the discharge.[147]

Finally, the ACCA faced yet another issue arising from the military judge's post-trial authority in *United States v. McNutt*.[148] During a Bridge-the-Gap session, the military judge allegedly informed the parties that his adjudged sentence to seventy-days confinement was framed to take into account the amount of good time credit the Soldier would receive (five days per month), and to ensure that the Soldier would only serve sixty-days confinement.[149] The ACCA determined that there was no basis for impeaching the accused's sentence as this type of extraneous information was "within the general and common knowledge a military judge brings to deliberations" and therefore was not improperly before the military judge.[150]

The court went on to comment that discussions during Bridge-the-Gap sessions are "expected, and usually beneficial";[151] however,

> the core of the deliberative process remains privileged, and military judges should refrain from disclosing information . . . concerning their deliberations, impressions, emotional feelings, or the mental processes used to resolve an issue before them . . . Military judges should therefore allow their findings and sentences to speak for themselves during "Bridge the Gap" sessions, and re-focus these sessions upon the conduct of counsel rather than the deliberations of the military judge.[152]

As in *Chisholm*, the ACCA's comments quoted above are clearly *dicta*. Although not binding, these comments signal the court's thinking and military judges, at least those in the Army, are wise to heed the court's comments.

Accused

In *Faretta v. California*,[153] the Supreme Court held that there is a constitutional right to self-representation at trial, provided there is a knowing and intelligent waiver of the right to counsel.[154] "An accused, desiring to proceed without counsel,

139. *Id*. at 660. The Article 15 was erroneously admitted because it predated by more than two years the offense for which the accused was on trial, in violation of naval regulations. *Id*.

140. *Id*.

141. MCM, *supra* note 4, R.C.M. 1009(a).

142. *Lepage*, 59 M.J. at 660.

143. *Id*. at 661. In the absence of the BCD, because the rest of the adjudged sentence included only fifteen-days confinement, forfeiture of $737 pay per month for one month, and reduction of E-1, the NMCCA would not have jurisdiction to review the case. *See* UCMJ, art. 66 (2002).

144. MCM, *supra* note 4, R.C.M. 1102(b)(2).

145. *LePage*, 59 M.J. at 661.

146. *Id*.

147. *Id*.

148. 59 M.J. 629 (Army Ct. Crim. App. 2003).

149. *Id*. at 630.

150. *Id*. at 632-33.

151. *Id*. at 633.

152. *Id*. (citations and footnotes omitted).

153. 422 U.S. 806 (1975).

154. *Id.* In contrast, there is no right under the Sixth Amendment to self-representation on direct appeal. Martinez v. Court of Appeal, 528 U.S. 152 (2000).

'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open."'[155] Rule for Court-Martial 506(d) applies *Faretta* to the military.[156] The CMA in *United States v. Mix*, suggested a procedure that would satisfy the "knowing and intelligent" and "eyes wide open" language of *Faretta*.[157] The current colloquy in the *Military Judge's Benchbook* largely adopted the policy the CMA suggested in *Mix*.[158]

In *Iowa v. Tovar*,[159] the Supreme Court limited *Faretta's* application in cases in which a defendant proceeds *pro se* at a guilty plea instead of a contested trial. Prior to proceeding *pro se* at a guilty plea, the Court held that the Sixth Amendment to the U.S. Constitution is satisfied if the trial court "informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea."[160] Further warnings, not required by the Sixth Amendment, include the following:

> (1) advis[ing] the defendant that waiving the assistance of counsel in deciding whether to plead guilty [entails] the risk that a viable defense will be overlooked; and (2) admonish[ing] the defendant that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty.[161]

Before allowing an accused to proceed *pro se*, RCM 506(d) requires the military judge to find that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding.[162] While RCM 506(d) is based on *Faretta*,[163] its requirements are not limited to contested cases.[164] Accordingly, because the President currently provides service members with protections above those required by the Sixth Amendment, the Court's holding in *Tovar* does not apply to military practice.[165]

Voir Dire and Challenges

This past year was active in the area of *voir dire* and challenges at all judicial levels, including the Supreme Court, federal circuit courts, the CAAF, and service courts. In particular, the CAAF continued its expansive view of the implied bias doctrine and the federal circuits weighed in on an open issue: whether a peremptory challenge based on religion is prohibited based on the rationale of *Batson v. Kentucky*[166] and its progeny.

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155. United States v. Mix, 35 M.J. 283, 285 (C.M.A. 1992) (citing *Faretta*, 422 U.S. at 835).

156. MCM, *supra* note 4, R.C.M. 506(d).

> *Waiver.* The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. Such waiver shall be accepted by the military judge only if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding. The military judge may require that a defense counsel remain present even if the accused waives counsel and conducts the defense personally. The right of the accused to conduct the defense personally may be revoked if the accused is disruptive or fails to follow basic rules of decorum and procedure.

Id.

157. *Mix*, 35 M.J at 289-90.

158. BENCHBOOK, *supra*, note 6, at 109.

159. 124 S. Ct. 1379 (2004).

160. *Id*. at 1382.

161. *Id*. at 1383.

162. MCM, *supra*, note 4, R.C.M. 506(d); *see supra* note 156.

163. MCM, *supra*, note 4, analysis at A21-30.

164. *Id*. R.C.M. 506(a) (describing the right to counsel "before a general or special court-martial") *see also* UCMJ art. 27 (2002).

165. *See, e.g.*, United States v. Lopez, 35 M.J. 35, 39 (C.M.A. 1992) (explaining the hierarchical source of rights in the military justice system).

> These sources are the Constitution of the United States; Federal Statutes, including the Uniform Code of Military Justice; Executive Orders containing the Military Rules of Evidence; Department of Defense Directives; service directives; and Federal common law . . . . Normal rules of statutory construction provide that the highest source authority will be paramount, unless a lower source creates rules that are constitutional and provide greater rights for the individual.

Id.

Challenges for Cause

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel."[167] One way this right is enforced is through the *voir dire* process, including the removal of unqualified members through the exercise of challenges for cause, as well as the peremptory challenge. Rule for Court-Martial 912 sets forth several bases to challenge a member for cause, including "whenever it appears that the member . . . should not sit . . . in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[168] While both prosecution and defense are entitled to unlimited challenges for cause, each side is limited to one peremptory challenge.[169] "In light of the manner in which members are selected to serve on courts-martial, including the single peremptory challenge afforded counsel under the UCMJ, [the CAAF] has determined that military judges must *liberally grant* challenges for cause."[170]

A challenge for cause can be based on either actual or implied bias, both of which are encompassed in RCM 912(f)(1)(N).[171] "The test for actual bias is whether any bias is such that it will not yield to the evidence presented and the judge's instructions."[172] A challenge for cause based on actual bias is a subjective determination based on the credibility of the member; accordingly, the military judge's decision is given great deference because of his or her opportunity to observe the demeanor of court members and assess their credibility during *voir dire*.[173] Implied bias, however, is reviewed under an objective standard, viewed through the eyes of the public.[174] "[A]t its core, implied bias addresses the perception or appearance of fairness of the military justice system."[175] Reflecting this difference in focus, the military judge's ruling on challenges for cause based on actual bias are reviewed for an abuse of discretion; "[b]y contrast, issues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than *de novo*."[176]

Over the last few terms, the CAAF has arguably expanded the doctrine of implied bias, a trend that continued this past term. Cases illustrating this trend include *United States v. Armstrong*,[177] *United States v. Wiesen*, [178] and *United States v. Miles*.[179]

In *Miles*, the accused pled guilty to wrongful use of cocaine.[180] The CAAF set aside the sentence finding that the military judge abused his discretion by failing to grant a defense challenge for cause based on implied bias. During *voir dire*, one of the members revealed his ten year-old nephew died as a result of his mother's pre-natal use of cocaine.[181] The member described the tragedy in an article in the base newspaper scheduled for publication four days later, and he remarked that the charges against the accused "triggered memories of his nephew's illness and death."[182] Moreover, the trial counsel commented during individual *voir dire* of the member that the event "evidently" was "a very traumatic experience" for him

166. 476 U.S. 79 (1986).

167. United States v. Downing, 56 M.J. 419, 421 (2002) (citation omitted).

168. MCM, *supra* note 4, R.C.M. 912(f)(1)(N).

169. UCMJ, art. 41(a)(1).

170. *Downing*, 56 M.J. at 422 (citation omitted).

171. *See* United States v. Daulton, 45 M.J. 212, 216 (1996).

172. United States v. Wiesen, 56 M.J. 172, 174 (2001), *recons. denied*, 57 M.J. 48 (2002).

173. *Daulton*, 45 M.J. at 217.

174. *Id*.

175. *Downing*, 56 M.J. at 422.

176. *Id*. (citation omitted).

177. 54 M.J. 51 (2000) (affirming the lower court's setting aside of the contested findings of guilty and sentence based on implied bias); *see* Lieutenant Colonel John P. Saunders, *Hunting for Snarks: Recent Developments in the Pretrial Arena*, ARMY LAW., Apr. 2001, at 25-28.

178. 56 M.J. 172, 174 (2001), *recons. denied*, 57 M.J. 48 (2002) (setting aside findings and sentence when brigade commander and subordinates he commanded, rated, or supervised made up two-thirds majority necessary to convict).

179. 58 M.J. 192 (2003). *But see Downing*, 56 M.J. at 419 (affirming military judge's denial of challenge for cause based on implied bias when member was friends with the prosecutor, had worked with him, bought a car from him, and had been to his beach house).

180. *Miles*, 58 M.J. at 193.

181. *Id*.

and his family.[183] The military judge denied the defense challenge for cause, finding no actual or implied bias. The defense preserved the challenge for appeal by using its peremptory challenge to remove the member, stating that but for the judge's ruling, the defense would have exercised its peremptory challenge against another member.[184]

The CAAF found the military judge abused his "limited discretion" in the area of implied bias.[185] "We conclude that asking [the member] to set aside his memories of his nephew's death and to impartially sentence Appellant for illegal drug use was 'asking too much' of him and the system."[186] The lesson of *Miles* is clear: although the court reiterated that "[a] member is not per se disqualified if he or she or a close relative has been a victim or a similar crime, [w]here a particularly traumatic similar crime was involved,"[187] the military judge's denial of a challenge for cause violates the liberal-grant mandate.[188]

Chief Judge Crawford dissented, expressing the view that "[e]ven though the military judge abused his discretion by denying a defense challenge for cause, the error was rendered harmless by the defense's use of his peremptory challenge to remove the same member."[189] In the Chief Judge's view, "R.C.M. 912(f)(4) does not create a *per se* rule of reversal . . ."[190] By exercising a peremptory challenge against that member, *and not identifying another member* he would have challenged, the appellant secured a fair and impartial panel. Accordingly, in the Chief Judge's view, the military judge's error in denying the defense challenge for cause was harmless.[191]

Chief Judge Crawford advocated that the military adopt the Supreme Court's view of denied causal challenges—the denied challenge is rendered harmless when the defense exercises a peremptory challenge to remove the same member.[192] The rationale of the Court is that the Sixth Amendment guarantees a fair and impartial jury; however, because there is no constitutional right to a peremptory challenge, there is no violation of the right to a fair and impartial jury if the defense is forced to use its peremptory challenge.[193] Notwithstanding the Supreme Court's pronouncements in this area, a majority of the CAAF has repeatedly refused to apply this rationale to the military.[194]

Challenges During and After Trial

Although challenges to court members are normally made prior to the presentation of evidence, RCM 912(f)(2)(B) per-

182. *Id*.

183. *Id*. at 194.

184. *Id*.; *see* MCM, *supra* note 4, R.C.M. 912(f)(4).

185. *Miles*, 58 M.J. at 195.

186. *Id*.

187. *Id*.

188. *Id.*; *see also* United States v. White, No. 2001132 (Army Ct. Crim. App. Dec. 8, 2003). (unpublished). The appellant was charged with attempted murder of his wife, and convicted of assault with intent to inflict grievous bodily harm as well as other offenses. The ACCA held that the military judge abused his discretion by denying a defense challenge for cause against a member whose wife was a victim of domestic abuse by her first husband. Individual *voir dire* revealed that the member's wife suffered a broken neck from the abuse; the member stated, "I've told him, simply, that, 'If I ever see you and you look like you're going to raise a hand for her, I'm gonna kill you and then we'll sort it out later.' That's kind of the way I feel about it." While the ACCA found no abuse of discretion as to actual bias, the court found error as to implied bias. "On these facts, an objective observer would likely question the fairness of the military justice system." The contested findings and sentence were set aside. *Id.*

189. *Id*. at 195-96 (Crawford, C.J., dissenting).

190. *Id*. at 196.

191. *Id.* at 198.

192. Ross v. Oklahoma, 487 U.S. 81 (1988) (stating that such a practice does not violate the Sixth Amendment right to a jury trial); *see also* United States v. Martinez-Salazar, 528 U.S. 304 (2000) (stating that such a practice does not violate the due process clause of the Fifth Amendment).

193. *Ross*, 487 U.S. at 86, 88, *quoted in* Miles, 58 M.J. at 196 (Crawford, J., dissenting).

194. United States v. Armstrong, 54 M.J. 51, 54 (2000) (rejecting harmless error analysis when denial of challenge for cause results in use of peremptory challenge to excuse member); *see also* United States v. Wiesen, 56 M.J. 172, 177 (2001), *recons denied*, 57 M.J. 48 (2002); *see also generally* United States v. Jobson, 31 M.J. 117 (C.M.A. 1990) (explaining rationale of RCM 912(f)(4)). In the face of the CAAF's clear rulings on this issue, the AFCCA has nonetheless held that the erroneous denial of a challenge for cause was harmless. *See* United States v. Williams, No. 33771, 2003 CCA LEXIS 141 (A.F. Ct. Crim. App. May 20, 2003) (unpublished) (stating that although the military judge abused his discretion in granting the trial counsel's challenge for cause against a disabled member over defense counsel's objection, the error was harmless). "An erroneous ruling on a challenge for cause does not automatically violate the right to an impartial jury . . . . If the court members who heard the case were impartial, the right is not violated." *Id.* at *18.

mits a challenge for cause to be made "at any other time during trial when it becomes apparent that a ground for challenge may exist."[195] Peremptory challenges may not, however, be made after the presentation of evidence begins.[196] Two service court cases from the last year faced the issue of challenges arising after the panel is assembled but prior to findings. Two CAAF cases address potential challenges that arise after adjournment of the court-martial.

During a lunch break in the proceedings in *United States v. Camacho*,[197] which occurred after completion of the government's case on the merits and rebuttal, the president of the panel was overheard stating to a government witness, "It's execution time," and making certain gestures, "including a vulgar one with his finger."[198] After hearing evidence and initially denying a defense challenge for cause against the member, the military judge heard additional evidence and granted the challenge.[199] Following the challenge, only two members remained. Consequently, the panel was below the three members required for a quorum in a special court-martial.[200] The convening authority detailed four new members, two of whom remained after *voir dire* and challenges.[201] Without defense objection and in the absence of the remaining original members, the newly empaneled members were read all the arguments and testimony, before resuming the proceedings.[202] This procedure is in accordance with RCM 805(d).[203] The NMCCA affirmed this process despite an appellate allegation that RCM 805(d)(1) is unconstitutional.[204]

> The gist of appellant's constitutional argument is that, in effect, two different panels received the evidence in very different ways, the old panel of two members having had the opportunity to observe the demeanor of all the witnesses with the new panel of two members not having that opportunity. Thus under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution, the appellant was deprived of her right to have the finders of fact evaluate the demeanor of each of the witnesses.[205]

The NMCCA did not directly decide the constitutional challenge, instead finding the defense engaged in a *de facto* waiver of its rights under the Confrontation Clause.[206] "Of great importance in this case is the fact that the defense offered no objection to the detailing of new members and the reading of testimony to those members . . . ."[207]

In *United States v. Bridges*,[208] the Coast Guard Court of Criminal Appeals (CGCCA) addressed a separate issue involving *voir dire* after the court is empaneled. In *Bridges*, the defense counsel moved to impeach the court's findings after they were announced due to alleged unlawful command influence.[209] The defense discovered an electronic mail (e-mail) from the SJA discussing a child sex abuse case—the appellant was also tried and convicted of sexually abusing a child.[210] The e-mail was sent approximately six weeks prior to the court con-

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195. MCM, *supra* note 4, R.C.M. 912(F)(2)(B).

196. *Id*. R.C.M. 912(g)(2).

197. 58 M.J. 624 (N-M. Ct. Crim. App.), *petition denied*, 59 M.J. 144 (2003).

198. *Id*. at 631.

199. *Id*. at 631-32.

200. *Id.* at 632 (citing UCMJ art. 16 (2002)).

201. *Id.*

202. *Id.*

203. MCM, *supra* note 4, R.C.M. 805(d)(1).

> When after presentation of evidence on the merits has begun, a new member is detailed under R.C.M. 505(c)(2)(B), trial may not proceed unless the testimony and evidence previously admitted on the merits, if recorded verbatim, is read to the new member, or, if not recorded verbatim, and in the absence of a stipulation as to such testimony and evidence, the trial proceeds as if no evidence has been presented.

Id. The discussion to the rule states, "When the court-martial has been reduced below a quorum, a mistrial may be appropriate." *Id.* Discussion.

204. United States v. Camacho, 58 M.J. 624, 632-33 (N-M. Ct. Crim. App.), *petition denied*, 59 M.J. 144 (2003).

205. *Id*.

206. *Id*. at 633; *see also* U.S. CONST. amend. VI.

207. *Camacho*, 58 M.J. at 633.

208. 58 M.J. 540 (C.G. Ct. Crim. App. 2003).

vening in *Bridges*, and included a summary of the facts of a recent appellate decision involving sex abuse. The e-mail was intended "to let people know that, even among our Coast Guard ranks, we have people who hurt children," and listed suggested actions that might be appropriate if one of the recipients of the message received a report of similar misconduct.[211]

The defense counsel claimed that, had she known of the e-mail, she would have questioned the members about it during *voir dire* and "might have elicited some information as to bias."[212] "Trial defense counsel did not challenge any member for cause after learning of the SJA's e-mail or specifically ask the military judge to permit additional *voir dire* on that issue."[213] The CGCCA held that the e-mail on its own was not "an apparent ground for challenge for cause" and ruled that the military judge did not abuse his discretion by failing to *sua sponte* reopen *voir dire*.[214]

As stated previously, two recent CAAF cases discuss issues concerning *voir dire* that arose after the court-martial is adjourned. In the first of these cases, *United States v. Humpherys*,[215] the defense submitted a post-trial motion for a new trial because two of the members were in the same rating chain, although both answered the military judge's question on that issue during group *voir dire* in the negative.[216] The military judge held a post-trial session under the provisions of Article 39(a), UCMJ, and questioned the involved members. Both responded that they did not remember the military judge asking the question and that their answers were not an effort to conceal the rating chain relationship.[217] The military judge concluded the members' responses during trial were "technically . . . incomplete," but their responses in the Article 39(a) session caused him to conclude he would not have granted a challenge for cause based on the relationship.[218] Accordingly, the military judge denied the defense motion for a new trial.[219]

The CAAF affirmed, reiterating the two-part showing a party must satisfy in order to merit a new trial for information not disclosed during *voir dire*. First, the party "must demonstrate that the panel member failed to answer honestly a material question on voir dire."[220] Second, the party must demonstrate "that a correct response would have provided a valid basis for a challenge for cause."[221] The CAAF stated that "an evidentiary hearing is the appropriate forum in which to develop the full circumstances surrounding each of these inquiries" and the appellate court's role in the process is to "ensure the military judge has not abused his or her discretion in reaching the findings and conclusions."[222] The CAAF concluded the military judge did not abuse his discretion after he determined that "full and accurate responses by these members would not have provided a valid basis for a challenge for cause against either or both."[223]

In contrast to the military judge's astute actions in *Humpherys*, the military judge in *United States v. Dugan* refused to grant a post-trial Article 39(a), UCMJ, session to *voir dire* members concerning alleged unlawful command influence that occurred during the panel's deliberations.[224] One of the members asserted that during deliberations, the panel discussed a recent "commander's call" wherein the commander spoke of

209. *Id.* at 550.

210. *Id.* at 542.

211. *Id.* at 550.

212. *Id.*

213. *Id.* at 551.

214. *Id.*

215. 57 M.J. 83 (2002).

216. *Id.* at 95.

217. *Id.*

218. *Id.*

219. *Id.* at 97.

220. *Id.* at 96.

221. *Id.*

222. *Id.*

223. *Id.* at 97.

224. United States v. Dugan, 58 M.J. 253, 255 (2003).

the "increasing problem of ecstasy use." The appellant was convicted, *inter alia*, of wrongful use of ecstasy.[225]

The CAAF remanded for a *Dubay* hearing. "[D]eliberations of court-martial members ordinarily are not subject to disclosure,"[226] however,

> under Military Rule of Evidence 606(b), there are three circumstances that justify piercing the otherwise inviolate deliberative process to impeach a verdict or sentence: "(1) when extraneous information has been improperly brought to the attention of the court members; (2) when outside influence has been brought to bear on a member; and (3) when unlawful command influence has occurred."[227]

The members' comments about the commander's call raised the issue of whether unlawful command influence has occurred and merited an additional fact-finding hearing.[228]

At the hearing, the court ruled that Military Rule of Evidence 606(b) permitted questioning of the members concerning the unlawful command influence issue. The Rule "permits voir dire of the members regarding what was said during deliberations about [the alleged unlawful command influence comments of a commander], but the members may not be questioned regarding the impact of any member's statements or the commander's comments on any member's mind, emotions, or mental processes."[229] Expect additional appellate litigation in *Dugan* following the *Dubay* hearing's completion.

Batson *Challenges (Peremptory Challenges)*

It has been almost twenty years since the Supreme Court's landmark decision in *Batson v. Kentucky*, which prohibited race-based peremptory challenges.[230] The Court extended *Batson* to gender-based challenges shortly thereafter.[231] In order to prove a "*Batson* violation," the party alleging improper use of a peremptory challenge must satisfy a three-part test:

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.[232]

The CMA applied *Batson*, including the three-part test, to the military through the Fifth Amendment due process clause.[233] Because military practitioners are permitted only one peremptory challenge, however, the first part of the three-part test, establishing a prima facie case of discrimination, is *per se* satisfied when a peremptory challenge is lodged against a minority or female.[234] Another distinction between military and

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225. *Id*. at 254.

226. *Id*. at 256 (quoting MCM, *supra* note 4, R.C.M. 923 (Discussion)).

227. *Id*. (citation omitted). Military Rule of Evidence 606(b) states:

> Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter or statement occurring during the course of the deliberations of the members of the court-martial or, to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence. Nor may the member's affidavit or evidence of any statement by the member concerning a matter about which the member would be precluded from testifying be received for these purposes.

MCM, *supra* note 4, MIL. R. EVID. 606(b).

228. *Dugan*, 58 M.J. at 259.

229. *Id*. at 260.

230. Batson v. Kentucky, 476 U.S. 79 (1986).

231. J. E. B. v. Alabama *ex rel*. T. B, 511 U.S. 127 (1994).

232. Hernandez v. New York, 500 U.S. 352, 358-59 (1991) (citing *Batson*, 476 U.S. at 97-98).

233. United States v. Santiago-Davila, 26 M.J. 380 (C.M.A. 1988); *see also* United States v. Green, 36 M.J. 274, 278, n.2 (C.M.A. 1993) (setting forth the three-part test).

234. United States v. Moore, 28 M.J. 366, 368 (C.M.A. 1989).

Supreme Court case law concerns the sufficiency of the rationale provided to rebut a prima facie case—part two of the three-part test. In *Purkett v. Elem*,[235] the Supreme Court held that

> the second step of this process does not demand an explanation that is persuasive, or even plausible. At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.[236]

In other words, the Supreme Court focused on the genuineness of the rationale provided, rather than its reasonableness. In contrast, in *United States v. Tulloch*,[237] the CAAF held that in order to rebut a prima facie case of discrimination, the challenged party's proferred rationale must not be "unreasonable, implausible, or [one] that otherwise makes no sense."[238]

Last term, in *Miller-el v. Cockrell*,[239] the Supreme Court commented on the third part of the *Batson* test—whether the party lodging the challenge has carried his burden of proving purposeful discrimination. In so doing, the Court may have signaled a move closer to the military's standard of reasonableness set forth in *Tulloch*, although the Court would not apply that standard until the third part of the *Batson* test. In an 8-1 opinion by Justice Kennedy, the Court reversed a lower court decision and remanded a death penalty case for further proceedings based on allegations that the prosecution systematically exercised its peremptory challenges to exclude African-American jurors.[240]

In *Miller-el*, after challenges for cause were exercised, Dallas County prosecutors peremptorily challenged ten of eleven remaining African-American venire members.[241] The prosecution was allotted and used fourteen peremptory challenges in total.[242] The Court discussed some of the evidence of discriminatory *voir dire* practices presented by the defense throughout direct and collateral appeals of the case: the prosecution questioned African American prospective jurors differently than white jurors; the prosecution engaged in a practice known as "jury shuffling," which tended to exclude black jurors; and, finally, evidence of a "systematic policy of excluding African-Americans from juries."[243] This latter evidence was adduced from former prosecutors in the Dallas County office and actual policy documents available to prosecutors at the time of petitioner's trial, including a circular that read, "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated."[244]

Applying the three-step *Batson* test, the state conceded the petitioner satisified step one: demonstrating a prima-facie claim of discrimination; and the petitioner acknowledged the state proceeded through step two by offering race-neutral explanations for strikes.[245] What remained to be determined, according to the Court, was whether the petitioner established step three: proving purposeful discrimination.[246] Crucial to this determination is the "persuasiveness of the prosecutor's justification for his peremptory strike. At this stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."[247] The Court determined that the issue came down to "whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy."[248] It is here that the lower courts' rationale fell short, as those courts merely accepted the state court's finding of credibility of the prosecutor's proferred

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235. 514 U.S. 765 (1995).

236. *Id.* at 768 (internal quotation and citation omitted).

237. 47 M.J. 283 (1997).

238. *Id*. at 287.

239. 537 U.S. 322 (2003).

240. *Id*. at 348.

241. *Id*. at 331.

242. *Id*. at 342.

243. *Id*. at 332-34.

244. *Id*. at 334-35.

245. *Id*. at 338.

246. *Id.*

247. *Id*. at 338-39 (citation and internal quotation omitted).

rationale, and did not consider that credibility in light of all the other evidence of purposeful discrimination.

Although *Tulloch* focused on the second-part of the *Batson* test and on reasonableness, rather than the genuineness of the proffered rationale for the strike, *Miller-el* nonetheless offers guidance to military practitioners. The factors the Supreme Court set forth provide some basis to determine whether the proferred rationale is one that is reasonable, plausible, and otherwise makes sense. In addition, the factors the Court listed in *Miller-el* apply to the third part of the *Batson* test as applied to the military.

The CAAF examined whether a specific rationale satisfied the *Tulloch* standard in *United States v. Hurn*.[249] The defense counsel objected after the trial counsel exercised the government's peremptory challenge against the panel's only non-Caucasian officer.[250] The trial counsel responded that his basis "was to protect the panel for quorum."[251] The CAAF held the reason proffered did not satisfy the underlying purpose of *Batson*, *Moore*, and *Tulloch*, which is to protect the participants in judicial proceedings from racial discrimination.[252] That did not end the court's inquiry, however, and two and one-half years after the trial, the trial counsel filed an affidavit setting forth additional reasons for challenging the member in question. Based on the affidavit, the CAAF remanded the case for an additional fact-finding hearing.[253]

The CAAF examined *Hurn* once again this past term following completion of the fact-finding hearing.[254] At the hearing, the trial counsel testified that he also removed the member because the member had expressed concern about his "pressing workload."[255] The military judge determined that this challenge was race-neutral and the CAAF affirmed, finding no "clear error."[256]

How do the military judge's findings and the CAAF's holding in *Hurn* square with *United States v. Greene*,[257] which held that a "mixed motive" peremptory challenge, that is a challenge that includes one motive for striking that is impermissible and one motive that is permissible, is a violation of *Batson*? One way might be that, while the original rationale provided in *Hurn* did not satisfy *Tulloch's* requirement of reasonableness and plausibility, that rationale was not overtly discriminatory, as was the offending secondary rationale in *Green*.[258]

The NMCCA examined a second rationale in *United States v. Allen*.[259] In *Allen*, the government challenged an officer panel member for cause "based on the fact he had previously been a criminal accused in a military justice case and, therefore, would likely hold the Government to a higher standard of proof than required by law."[260] The military judge denied the challenge for cause and the government exercised its peremptory challenge against the same member.[261] The defense made a *Batson* objection and the government proffered the same rationale previously provided to justify the challenge for cause.[262] The NMCCA held that the government's rationale articulated a race neutral, reasonable, plausible reason for challenge that otherwise made sense, and further, the fact that the proffered rationale for the peremptory challenge mirrored the rationale for the

248. *Id*. at 339.

249. 55 M.J. 446, *recons. denied*, 56 M.J. 252 (2001).

250. *Id*. at 447-48.

251. *Id*. at 448.

252. *Id*.

253. *Id*. at 448-49.

254. United States v. Hurn, 58 M.J. 199 (CAAF), *recons. denied* 58 M.J. 293, *cert. denied*, _ U.S. _, 124 S.Ct. 416 (2003).

255. *Id*. at 200.

256. *Id*. at 201.

257. 36 M.J. 274 (C.M.A. 1993).

258. *Id*. at 277 (stating that the prohibited rationale was, as stated by the trial counsel, that the member possessed a "Latin macho type of attitude which I think a lot of the males in Panama still have; what we would call 'a macho type of attitude,' and that spills over into the sexual arena." The non-discriminatory rationale proferred was that the member would hold against the trial counsel the fact that the military judge had to instruct him on keeping an open mind with regard to sentencing).

259. 59 M.J. 515 (N-M Ct. Crim. App. 2003), *aff'd*, 59 M.J. 478 (2004).

260. *Id*. at 529.

261. *Id*.

262. *Id*.

denied challenge for cause added to the credibility of the peremptory rationale.[263] Finally, the court noted that the government could have used its peremptory challenge to remove a second member whose challenge for cause was also denied. This, however, did not make its exercised challenge an impermissible one.[264]

The Supreme Court has not ruled on whether *Batson's* rationale extends any further than race and gender discrimination. Because part of the focus of *Batson* and its progeny is protecting the equal protection right of jurors or panel members to serve, *Batson's* protections could arguably extend to other groups protected under the equal protection clause. For example, the equal protection clause prohibits discrimination based on religion. The CMA noted that "the Supreme Court has not extended *Batson* to challenges based on religion,"[265] however, like the Supreme Court, the CAAF has also never squarely faced the issue of whether *Batson* extends to religion-based peremptory challenges.

Two federal circuits, however, faced this issue during the past year. Both concluded that *Batson's* protections extend to religion-based peremptory challenges, but distinguished between strikes motivated by religious beliefs or heightened religious activities, and strikes motivated by religious affiliation. The Third Circuit is the first federal circuit to directly address *Batson's* applicability to religious-based challenges. In *United States v. DeJesus*, the court drew a distinction between a permissible strike motivated by "heightened religious involvement" and one motivated by "a specific religious affiliation."[266] In *DeJesus*, the government peremptorily struck two jurors.[267] One juror stated the following in his questionnaire: (a) his hobbies involve civic activities with his church; (b) he reads the Christian Book Dispatcher; (c) he holds several biblical degrees; (d) he is a deacon and Sunday School teacher in the local church; and, (e) he sings in a couple of church choirs.[268]

The second challenged juror revealed that "(a) he is an officer and trustee in his church; (b) he reads the Bible and related literature; and (c) his hobbies are church activities."[269] The defense posed a *Batson* challenge based on race, because both of the challenged jurors were African-American. The government responded that the strike against the first juror "was based [*inter alia*] on the juror's high degree of religious involvement," and the strike against the second juror was because his "fairly strong religious beliefs might prevent him from rendering judgment against another human being."[270] The defense stated that *Batson* prohibits strikes based on religion and urged the court to deny the government's peremptory challenges.[271] The district court denied the defense's *Batson* challenge, stating, "[i]ts understanding that the defendant's challenge was not a challenge based on some denomination of religion, but it is a challenge based upon how the jurors chose to spend their time, reading the bible."[272] In so doing, the "District Court assumed that the categorical striking of a juror based upon denomination affiliation . . . would be constitutionally offensive to the guarantee of free religious affiliation."[273] The district court found, however, that the government's proferred rationale did not rest on religious affiliation; rather, the rationale related to concerns manifested by the jurors' "unusual degree of involvement in church activities and religious readings, but not directly associated with a specific religion, that may affect the jurors' judgment of others."[274]

On appeal from his conviction, DeJesus alleged that "*Batson* extends to peremptory strikes based on religious affiliation and that the government impermissibly struck [the two jurors] on the basis of their Christian affiliation.[275] Further, DeJesus main-

263. *Id*. at 530.

264. *Id*. at 529-30.

265. United States v. Williams, 44 M.J. 482, 485 (1996) (holding that *Batson* did not prohibit challenge based on a member's fraternal organization—the Masons; the record was "devoid of any information as to [the challenged member's] religious affiliation or beliefs").

266. 347 F.3d 500, 502 (3d Cir. 2003), *cert. denied*, _ U.S. _, 124 S.Ct. 2811 (2004).

267. *Id*. at 502.

268. *Id*.

269. *Id*.

270. *Id*. at 503 (internal quotations and citation omitted).

271. *Id*.

272. *Id.* (internal quotation and citation omitted).

273. *Id*. at 509.

274. *Id*.

275. *Id.* at 505.

tained that the jurors' religious affiliations—Christian—"were made apparent by their responses to the questionnaires."[276] The government responded "that the strikes were based only on the jurors' beliefs and that strikes based on beliefs, even if religiously-inspired, are permissible."[277]

The court noted that there was "no clear consensus among the other [federal] Circuits on this issue"[278] and that there are varying approaches by the state courts.[279] Because the court affirmed the trial court's "finding that the government's strikes were based on the jurors' heightened religious involvement rather than their religious affiliation, [it did not] reach the issue of whether a peremptory strike based solely on religious affiliations would be unconstitutional."[280] The court added that even if it assumed "the exercise of a peremptory strike on the basis of religious affiliation is unconstitutional, the exercise of a strike based on religious beliefs is not."[281] Accordingly, the trial court's "finding that the government struck [the jurors] out of concern that their heightened religiosity would render them unable or unwilling to convict was not erroneous."[282]

Following the Third Circuit's opinion in *DeJesus*, the Second Circuit faced the same issue in *United States v. Brown*.[283] In *Brown*, the prosecutor peremptorily challenged a juror in part because of the juror's "avid participation in church affairs."[284] The defense posed a race-based *Batson* challenge, but did not allege a religion-based challenge. As a result, the Second Circuit reviewed the appellate claim of a religious-based challenge for plain error.[285] To establish plain error in federal court:

> [T]here must be (1) error, (2) that is plain, and (3) that affects substantial rights . . . . If these three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.[286]

Remarkably, despite a lack of precedent from the Supreme Court, the *Brown* court found that "if a prosecutor, when challenged said that he had stricken a juror because she was Muslim, or Catholic, or evangelical, upholding such a strike would be error. Moreover, such an error would be plain."[287] The court explained:

> Exercising peremptory strikes simply because a venire member affiliates herself with a certain religion is therefore a form of state-sponsored group stereotype rooted in, and reflective of, historical prejudice. Such strikes, like those based on race and gender, cause harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. That harm flows directly from the government's participation in the perpetuation of these invidious group stereotypes and the inevitable loss of confidence in our judi-

276. *Id*. at 510.

277. *Id*.

278. *Id.*

279. *Id.* (citing and *comparing* State v. Fuller, 812 A.2d 389, 397 (N.J. Super. Ct. App. Div. 2002) (finding that exclusion of jurors based on religious affiliation would violate the state constitution's Equal Protection Clause), State v. Purcell, 18 P.3d 113, 120 (Ariz. Ct. App. 2001) (holding that *Batson* encompasses peremptory strikes based upon religious affiliation or membership), *and* Thorson v. State, 721 So. 2d 590, 594 (Miss. 1998) (holding that state constitutional and statutory law prohibit the exercise of peremptory challenges based solely on a person's religion), *with* Casarez v. State, 913 S.W.2d 468, 496 (Texas Crim. App.1994) (*en banc*) (holding that "interests served by the system of peremptory challenges in Texas are sufficiently great to justify State implementation of choices made by litigants to exclude persons from service on juries . . . on the basis of their religious affiliation."), *and* State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993) (declining to extend *Batson* to strikes on the basis of religious affiliation)).

280. *Id*.

281. *Id*.

282. *Id*. at 511.

283. 352 F.3d 654 (2d Cir. 2003).

284. *Id*. at 658.

285. *Id*. at 663.

286. *Id*. (internal quotations and citations omitted). *Compare id.*, *with United States v. Powell*, 49 M.J. 460 (1998) (holding that, due to UCMJ, art. 59(a), to merit relief for plain error in the military, there must be error; the error must be plain, that is clear or obvious, and the error must materially affect the appellant's substantial rights).

287. *Id.* at 669.

> cial system that state-sanctioned discrimination in the courtroom engenders.[288]

The prosecution's rationale in *Brown*, focusing on the juror's activities in church groups, is not as simple.[289] This differentiation "on the basis of [] activities does not plainly implicate the same unconstitutional proxies as distinctions based solely on religious identity."[290] While the court admitted that "[t]his may be a dubious inference . . . that does not make it an unconstitutional one."[291] Accordingly, any error in granting the challenge did not amount to plain error under the facts of the case.

The discussion of whether *Batson* applies to religion-based challenges and the distinction between religious activities and religious affiliation is an interesting, and perhaps critical issue for constitutional purposes. Because neither the CAAF nor the Supreme Court have ruled on the issue, trial practitioners, in particular trial counsel, are wise to avoid peremptory challenges based solely on religious affiliation. In the absence of a definitive decision from the CAAF in particular, a peremptory challenge based on religious affiliation may engender a conviction now but a reversal down the road.

Pleas and Pretrial Agreements

Introduction

In order to ensure that a guilty plea is truly knowing and voluntary, the CMA established the "*Care*" inquiry, named after the 1969 seminal case of the same name.[292] The *Care* inquiry is based on Federal Rule of Criminal Procedure 11, which governs plea procedures in federal criminal guilty pleas, Supreme Court case law interpreting the Constitution, and Article 45, UCMJ, and is now largely codified in RCM 910. The *Military Judge's Benchbook* provides a detailed script for the military judge to follow to ensure the mandates of *Care* and subsequent case law expanding the required colloquy are scrupulously followed.[293]

Despite the long-standing requirements of *Care* and its progeny, the hallmark of this past year's decisions concerns a lack of attention to detail and a resulting failure to comply with *Care's* mandate. From the beginning to the end of the plea inquiry, military judges are neglecting to follow the *Benchbook* script and are leaving out crucial requirements necessary to ensure a knowing and voluntary plea. Instead of speaking up to correct the military judge, trial counsel are remaining silent. Due to this dual neglect, the appellate courts are setting aside findings of guilt and, when appropriate, sentences.

Case law in the pretrial agreement area continues the trend of expansive permissible bargaining. This expansion, however, is not without limits, as a case from the Navy-Marine court reminds practitioners. Finally, three cases this past year discuss a recurring issue with regard to conditional guilty pleas and all three caution both the government and the military judge on the use and effect of those pleas.

Advice Concerning Rights Waived by Plea

Following Supreme Court case law of the same year, *Care* mandated a crucial and constitutionally required ingredient to a knowing and voluntary plea:

> the record must [] demonstrate the military trial judge . . . personally addressed the accused, [and] advise[] him that his plea waives his right against self-incrimination, his right to a trial of the facts by a court-martial, and his right to be confronted by the witnesses against him, and that he waives such rights by his plea.[294]

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288. *Id.* (citations and internal quotations omitted).

289. *Id.*

290. *Id.*

291. *Id. See also* United States v. Stafford, 136 F.3d 1109 (7th Cir. 1998) (focusing on the distinction between religious affiliation and religious belief).

> It is necessary to distinguish among religious affiliation, a religion's general tenets, and a specific religious belief. It would be improper and perhaps unconstitutional to strike a juror on the basis of his being a Catholic, a Jew, a Muslim, etc. It would be proper to strike him on the basis of a belief that would prevent him from basing his decision on the evidence and instructions, even if the belief had a religious backing; suppose for example that his religion taught that crimes should be left entirely to the justice of God. In between and most difficult to evaluate from the standpoint of *Batson* is a religious outlook that might make the prospective juror unusually reluctant, or unusually eager, to convict a criminal defendant. That appears to be this case.

Id. at 1114. The Seventh Circuit did not decide the issue as it found no plain error. *Id.*

292. United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

293. *See* BENCHBOOK, *supra* note 6.

294. *Id.* at 541. *See* Boykin v. Alabama, 395 U.S. 238 (1969); *see also* MCM, *supra* note 4, R.C.M. 910(c).

In *United States v. Hansen*,[295] the CAAF addressed the effect of a military judge's failure to inform the accused of any of the three rights waived by his plea. While the court denoted these rights "central to the American perception of criminal justice,"[296] and "fundamental to the military justice system,"[297] the court nonetheless declined to adopt a per se rule that a failure to fully advise an accused of these rights mandates reversal. The court stated, "What is important, in our view, is that the accused is aware of the substance of his rights and voluntarily waives them."[298] This determination is based, according to the court, not on whether there is "exemplary compliance" with *Care*, but rather "whether the combination of all the circumstances leads the court to conclude that the accused's plea was informed and voluntary."[299]

Applying this analysis, the court determined the military judge's statements, when combined, adequately apprised Hansen that, by pleading guilty, he gave up the right to a trial of the facts by the court.[300] The court was not satisfied, however, that the same was true as to the right of confrontation and the right against self-incrimination. "The combination of all the circumstances surrounding the judge's statements regarding those particular rights falls short of demonstrating that Appellant's guilty plea and waiver of the rights was informed and voluntary . . . ."[301] The court concluded:

> Pretrial agreements are mortar and brick in the military justice system. The knowing and intelligent waiver of constitutional rights is the foundation upon which they rest. This Court does not require incantation of constitutional formulas. However, we do require a record of confidence that an individual accused had his rights explained to him, understood his rights, and knowingly and intelligently waived them. Because the relinquishment of these bedrock constitutional rights is the essence of the plea bargain, we will not presume or imply that a military accused understood them and waived them, absent a demonstrable showing in the record that he did in fact do so.[302]

What is most interesting about the *Hansen* decision is that, without even citing to it, the court's opinion completely rejects Supreme Court precedent in this area. In *United States v. Vonn*,[303] the Court addressed the issue of a trial judge's failure to inform a defendant entering a guilty plea that, in accordance with Federal Rule of Criminal Procedure 11 (upon which RCM 910 is based), he had a constitutional right to the assistance of counsel should he plead not guilty and proceed to trial. The Court made two findings: first, that by failing to object to the judge's omission, Vonn waived the issue for appeal absent plain error. Therefore, on appeal it was the defense's burden to prove error—plain and obvious error—that affected Vonn's substantial rights.[304] Second, in determining whether there is plain error in a guilty plea advisement, the court may look beyond the plea colloquy to other parts of the official record to see whether the defendant's substantial rights were affected.[305]

Chief Judge Crawford, in her dissent in *Hansen*, advocated adopting *Vonn's* plain error requirement when the accused fails to object to the judge's failure to advise of the rights waived by a plea.[306] The majority soundly rejected *Vonn* and the rationale underlying the Supreme Court's opinion—that *the defense* bears some responsibility for ensuring the accused understands the rights he foregoes by pleading guilty, and that, on appeal, a failure to object to lack of advisement of those rights waives

295. 59 M.J. 410 (2004).

296. *Id*. at 411.

297. *Id*.

298. *Id*. at 412.

299. *Id*. (internal quotations and citations omitted).

300. *Id*. at 413.

301. *Id.*

302. *Id*. at 413-14.

303. 535 U.S. 55 (2002).

304. The Court later expounded on what showing is necessary to demonstrate an affect on one's substantial rights. In *United States v. Dominguez Benitez*, 124 S. Ct. 2333, 2340 (2004), the Court held that "a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea."

305. *Vonn*, 535 U.S. at 61. Because the Circuit Court of Appeals considered only the plea colloquy, the Supreme Court reversed and remanded for further consideration in light of its opinion. On remand, the Circuit Court affirmed the conviction. United States v. Vonn, 294 F.3d 1093 (9th Cir. 2003).

306. United States v. Hansen, 59 M.J. 410, 415 (Crawford, C.J., dissenting).

them absent plain error—by simply affirming that, "After all, *the military judge* is required to ensure that the accused personally understands the rights he is about to waive." [307] After *Hansen*, it is clear that in the military justice system, the defense bears no such burden.

Factual Basis for Plea

A critical area of the plea inquiry involves ensuring the plea has a sufficient factual predicate. To establish a sufficient factual predicate, the military judge must fully explain the elements of the offenses to which the accused is pleading guilty. As stated in *Care*,

> [T]he record of trial . . . must reflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge . . . has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which his is pleading guilty.[308]

The CAAF and the service courts continue to confront military judges' failure to comply with this mandate to sufficiently explain the elements of the offenses. In *United States v. Redlinski*,[309] the CAAF set aside an improvident plea and the resulting sentence because the military judge failed to adequately explain the elements of attempted distribution of marijuana. The military judge advised the accused of the elements of the completed offense of distribution and put the word "attempted" in front of those elements.[310] In doing so, the military judge failed to advise the appellant of the four elements of attempt: (1) an overt act; (2) done with specific intent to commit an offense under the UCMJ; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended offense.[311]

The court reiterated that, in order for a plea to be knowing and voluntary, *Care* requires the record of trial to "reflect" that the elements of each offense charged have been explained to the accused by the military judge.[312] "If the military judge fails to do so, he commits reversible error unless it is clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty."[313] The court "looks to the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially."[314] By describing attempt as a "complex, inchoate offense," in contradiction to a more simple military offense, and finding no evidence that the accused understood the four elements of attempt "either explicitly or inferentially," the court concluded that the plea to attempted distribution of marijuana was improvident.[315]

As in *Redlinski*, a military judge's failure to explain the elements of the offense rendered the pleas improvident in two additional service court opinions. In the first case, *United States v. Martens*, the AFCCA determined insufficient the military judge's explanation of the elements of transporting child pornography by computer in foreign commerce in violation of 18 U.S.C. § 2252A.[316] In particular, the military judge failed to define the term "foreign commerce," which, under the statutory provision at issue, is defined as "commerce between the United States and another nation."[317] The military judge's failure, in conjunction with the inaccurate suggestion in the stipulation of fact that the term "foreign commerce" meant commerce between any two countries,[318] and the failure of the appellant to state that the images in question traveled to, from, or through the United States rendered the plea improvident. [319] The AFCCA, however, affirmed a finding of guilty to the lesser-

307. *Id.* at 413 (emphasis added).

308. United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969) (citations omitted). *See also* MCM, *supra* note 4, R.C.M. 910(c) and (e).

309. 58 M.J. 117 (2003).

310. *Id.* at 118.

311. *Id.* at 119.

312. *Id.*

313. *Id.* (citation omitted).

314. *Id.* (citations omitted).

315. *Id.*

316. 59 M.J. 501, 503 (A.F. Ct. Crim. App.), *petition granted*, 59 M.J. 30 (2003) (quoting 18 U.S.C. § 2252(a)(2)(A) (2000), which punishes, in pertinent part, "Any person who . . . knowingly receives or distributes-any child pornography that has been mailed, or shipped or transported in interstate of foreign commerce by any means, including by computer . . . .").

317. *Id.* at 506, 514 (citing 18 U.S.C. § 10; Gibbons v. Ogden, 22 U.S. 1, 193 (1824)).

included offense of service discrediting conduct under Article 134, UCMJ, and affirmed the sentence.[320]

The second of the two service court cases rendered improvident by a failure to adequately explain the elements of the offense is *United States v. Burris*.[321] In *Burris*, the CGCCA set aside as improvident a plea to dishonorable failure to pay a just debt due to the military judge's failure to define the term "dishonorable."[322] The CGCCA followed the CAAF's lead in *Redlinski* and the CAAF's 2002 opinion in *United States v. Bullman*,[323] another case in which the military judge failed to define the same term for the same offense as in *Burris*. The government attempted to distinguish *Bullman* by arguing that the military judge's failure to define dishonorable did not render Burris' plea improvident because he "admitted facts necessary to establish the charges, expressed a belief in his own guilt, and did not cause facts to remain in the record that are inconsistent with the guilty pleas."[324] The CGCCA disagreed, citing among other factors, Burris' statements that were "inconsistent with dishonorable conduct."[325] The record of trial did not establish, "either explicitly or inferentially, that the Appellant otherwise understood this critical distinction between a dishonorable failure and a negligent failure to pay a debt,"[326] thus rendering the plea improvident. Notwithstanding the appellant's improvident plea to the dishonorable failure to pay a just debt, the CGCCA affirmed the remaining findings of guilty and the sentence.[327]

In contrast to the results of *Redlinski*, *Martens*, and *Burris*, the ACCA faced the military judge's failure to explain the elements of the more simple offenses of wrongful appropriation and forgery in *United States v. Morris*.[328] During the plea colloquy concerning wrongful appropriation, the military judge "failed to follow the usual practice of Army military judges in that he did not read to appellant applicable definitions from the [*Military Judge's Benchbook*]," including the definitions of the terms "possession," "owner," "belongs," and "took."[329] As for the colloquy concerning the forgery offense, the military judge likewise failed to provide any definitions from the *Benchbook*, including those for the terms, "falsely made or altered" and "intent to defraud."[330] Unlike the CAAF's result in *Redlinski*, the ACCA nonetheless affirmed the findings and sentence.[331] Like the CAAF in *Redlinski*, the ACCA based its decision on the distinction between complex offenses and more simple offenses. "For the most complex offenses, such as conspiracy or accessory after the fact, failure to explain the elements will generally result in reversal."[332] For other offenses, however, failure to explain the elements is error, but not necessarily reversible error "if the accused admits facts which establish that all the elements were true."[333] Although the military judge's failure reflects a "lack of attention to detail," the "three most critical requirements for a provident guilty plea were met. Appellant admitted the facts necessary to establish the charges, he expressed a belief in his own guilt, and there were no inconsistencies between the facts and the pleas."[334]

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318. *Id*.

319. *Id*.

320. *Id*. at 507.

321. 59 M.J. 700 (C.G. Ct. Crim. App. 2004).

322. *Id*. at 701. In the context of the offense of dishonorably failing to pay a just debt, the element of dishonor means that "[m]ore than negligence in nonpayment is necessary. The failure to pay must be characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude toward one's just obligations." *Id*. at 702 (quoting MCM, *supra* note 4, pt. IV, para. 71(c)).

323. 56 M.J. 377, *aff'd on recons.*, 57 M.J. 478 (2002).

324. *Burris*, 59 M.J. at 703.

325. *Id*. The accused stated: "he simply could not pay his debts as they were due, and alluded to severe pay problems that left him unable to pay for basics, such as car insurance and his children's needs at school." *Id*.

326. *Id*.

327. *Id*. at 704.

328. 58 M.J. 739 (Army Ct. Crim. App.), *petition denied* 59 M.J. 163 (2003).

329. *Id*. at 740-41.

330. *Id*. at 741.

331. *Id.* at 743.

332. *Id*. at 742 (citation omitted).

333. *Id*.

What should practitioners make of *Redlinski*, *Martens*, *Burris*, and *Morris*? Obviously, military judges should scrupulously apprise the accused of the elements of any offenses to which he is pleading guilty, as well as the correct definitions of terms found in their elements. Trial counsel should pay close attention to the military judge's advice to the accused during the plea inquiry and should speak up when the military judge's advice is inadequate. The Army Court of Military Review recognized this dual responsibility long ago:

> While the military judge bears the ultimate responsibility for the [guilty plea] inquiry, the trial counsel is not a mere bystander. We have recently commented on the need for trial counsel's involvement in procedural matters . . . . It is even more important in a guilty plea case that trial counsel play an active role in the proceedings. The prudent prosecutor will diligently assure that a providence inquiry is conducted in full compliance with the dictates of R.C.M. 910 and *Care*.[335]

Permissible/Impermissible Terms of Pretrial Agreements

Pretrial agreements may not contain terms that violate appellate case law, public policy, or the military judge's notion of fairness.[336] "Pretrial agreement provisions are contrary to 'public policy' if they interfere with court-martial fact-finding, sentencing, or review functions or undermine public confidence in the integrity and fairness of the disciplinary process."[337] Permissible pretrial agreement terms include the following: a promise to enter into a stipulation of fact, a promise to testify as a witness in the trial of another person, a promise to pay restitution, a promise to conform the accused's conduct to certain conditions, a promise to waive the Article 32 investigation, the right to a trial by members, or the right to the personal appearance of witnesses at sentencing proceedings.[338] Impermissible terms include an agreement to deprive the accused of "the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the complete and effective exercise of post-trial and appellate rights."[339]

This past year, the CAAF and service courts continued their expansive view of the limits of permissible bargaining in pretrial negotiations, with one exception. In *United States v. Edwards*, the appellant, as part of his pretrial agreement agreed not to discuss, in his unsworn statement, any circumstances surrounding potential constitutional violations occurring during the Air Force Office of Special Investigations' interrogation of him, which took place after his defense counsel was detailed.[340] Recognizing that this provision "might involve public policy considerations,"[341] the military judge conducted a detailed inquiry into the provision and the voluntariness of the appellant's waiver of his right to discuss the interrogation in his unsworn statement.[342] On appeal, the appellant challenged the provision as void against public policy. A provision contrary to public policy cannot be waived; however, if the provision is not contrary to public policy and is not otherwise prohibited, the accused may knowingly and voluntarily waive the right involved.[343] The CAAF determined the provision did not violate public policy. In particular, the court determined the provision did not violate RCM 705's proscription against terms that deprive one of a complete sentencing proceeding because the information did not constitute extenuation, mitigation, or rebuttal to prosecution matters.[344]

In *United States v. Henthorn*, the NMCCA approved a pretrial agreement term in which the accused agreed to forfeit his laptop computer.[345] The appellant was convicted of receiving child pornography in violation of 18 U.S.C. § 2252A. On

334. *Id.* at 743.

335. United States v. Harris, 26 M.J. 729, 734 (A.C.M.R. 1988).

336. United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976).

337. United States v. Cassity, 36 M.J. 759, 762 (N-M.C.M.R. 1992) (citing United States v. Mitchell, 15 M.J. 238, 240-241 (C.M.A. 1983); United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976); United States v. Foust, 25 M.J. 647, 649 (A.C.M.R. 1987); United States v. Jones, 20 M.J. 853, 855 (A.C.M.R. 1985), *aff'd*, 23 M.J. 305 (C.M.A. 1987); United States v. Callahan, 22 C.M.R. 443, 448 (A.B.R. 1956)).

338. MCM, *supra* note 4, R.C.M. 705(c)(2).

339. *Id.* R.C.M. 705(c)(1)(B).

340. 58 M.J. 49, 51 (2003).

341. *Id.*

342. *Id.*

343. *Id.* at 52.

344. *Id.* at 53. Following *Edwards*, the AFCCA approved a term in a pretrial agreement wherein the accused agreed not to provide comparative sentencing information in his unsworn statement. United States v. Oaks, No. 34676, 2003 CCA LEXIS 301 (A.F. Ct. Crim. App. Dec. 10, 2003) (unpublished).

appeal, he challenged a provision in his pretrial agreement that required him to "forfeit to the United States immediately and voluntarily any and all assets and property, or portions thereof, subject to forfeiture, pursuant to 18 U.S.C. § 2253 . . . . The assets to be forfeited specifically include the following: One . . . Laptop Computer . . . ."[346] The appellant argued that the provision "constituted an unauthorized forfeiture of fine and therefore an excessive or harsh punishment not permitted by the UCMJ."[347] The NMCCA disagreed, finding that the provision was not against public policy and was not punishment.[348] "Rather, it is an agreement designed to achieve broad remedial aims. Such a provision removes from circulation computer equipment that has been used to store and further the dissemination of child pornography."[349] Declaring that the provision "encompasses acceptable public policy aims," the court dryly noted that "if the appellant found his agreement too onerous, he could have withdrawn from it."[350]

Despite the expansive bargaining generally permitted this past year, there are limits to acceptable pretrial agreement terms. One of those limits was delineated by the NMCCA in *United States v. Sunzeri*.[351] The pretrial agreement term at issue in *Sunzeri*, which originated with the accused, prohibited the defense from presenting the testimony of witnesses located outside of Hawaii, where the trial occurred—either in person, by telephone, letter, or affidavit.[352] In the absence of the provision, the accused would have presented in person the testimony of two witnesses whose presence the military judge previously ordered.[353] On appeal, the accused alleged that the term violated public policy. The NMCCA agreed, stating the provision deprived the appellant of a complete sentencing proceeding in violation of RCM 705.[354]

In support of its decision, the NMCCA set forth a three-part rationale. First, the court relied on the plain meaning of RCM 705, which prohibits pretrial agreement terms that deprive the accused of a complete sentencing proceeding.[355]

> To find that the appellant had been afforded a complete sentencing hearing, when he was unable to present any evidence from individuals who did not live on the island of Oahu, would simply ignore the plain meaning of "complete sentencing proceeding," particularly so where the appellant told the military judge that but for the provision he would have presented more evidence.[356]

Second, RCM 705 permits a provision in which the accused waives the right to the personal appearance of witnesses for sentencing.[357] "In providing for the waiver of the right to personal witnesses in sentencing proceedings, it seems clear that the President authorized that as the sole limitation to the general rule that the accused is entitled to 'complete sentencing proceedings.'"[358] Third, although the court recognized the "move toward approving pretrial agreement provisions that originate

345. 58 M.J. 556 (N-M. Ct. Crim. App. 2003).

346. *Id*. at 557.

347. *Id*. (citation omitted).

348. *Id*. at 558.

349. *Id*.

350. *Id*. (internal quotation and citation omitted).

351. 59 M.J. 758 (N-M. Ct. Crim. App. 2004).

352. *Id*. at 760. The specific wording of the provision is as follows:

> That, as consideration for this agreement, the government and I agree not to call any off island witnesses for presentencing, either live or telephonically. Furthermore, substitutes for off island witness testimony, including but not limited to, Article 32 testimony, affidavits or letters will not be permitted or considered when formulating an appropriate sentence in this case.

Id. In a second provision, the accused agreed that the government was not required "to provide for the personal appearance of witnesses who reside off the island of Oahu to testify during the sentencing phase of the court-martial." *Id*. at 759.

353. *Id*. at 760.

354. *Id*. at 761.

355. MCM, *supra* note 4, R.C.M. 705(c)(1)(B).

356. *Sunzeri*, 59 M.J. at 761.

357. MCM, *supra* note 4, R.C.M. 705(c)(2)(E).

358. *Sunzeri*, 59 M.J. at 761.

with the appellant,"[359] they could not find case law that approves of terms specifically prohibited by RCM 705. "That rule," concluded the court, "narrowly proscribes the area in which the President has determined a pretrial agreement may not be used to restrict the rights of the accused. The proposal before us did just that, in violation of that rule—in violation of public policy."[360]

Edwards, *Henthorn*, and *Sunzeri*, and the cases and other sources upon which those decisions rely, provide an excellent template of how to evaluate a pretrial agreement term to determine whether or not it violates public policy. In this era of expansive bargaining, practitioners should review and consider all three cases any time either side proposes a novel term for inclusion in a pretrial agreement.

Conditional Pleas

In general, a guilty plea "which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made."[361] There are only two ways to preserve issues that are otherwise waived by a guilty plea: to plead not guilty; or to enter into a conditional plea, which requires the consent of the government and the approval of the military judge. If an appellate court finds that the military judge's ruling on the preserved issue was erroneous, the accused may then withdraw his plea.[362] A trio of cases this past year remind practitioners of the specific issues the parties must address when a conditional plea is considered. In two of those cases, due to a lack of attention to details and potential ramifications of the particular conditional pleas at issue, the appellant was permitted to withdraw his entire guilty plea, even though the issue preserved by the conditional plea did not affect the entire plea.

In *United States v. Mapes*, the appellant was convicted of involuntary manslaughter and various other offenses arising from his injection of a fellow Soldier with a fatal dose of heroin.[363] The appellant entered into a pretrial agreement that permitted him to enter a conditional plea pursuant to RCM 910(a)(2) that preserved his "right to appeal all adverse determinations resulting from pretrial motions."[364] At trial, the appellant moved to dismiss all charges due to improper use of immunized testimony and evidence derived from that immunized testimony in violation of *Kastigar v. United States*.[365] Although the CAAF dismissed most of the charges and specifications due to the *Kastigar* violation, the appellant was permitted to withdraw his plea to the remaining offenses which were *not* directly tainted by the violation because the violation caused or played a substantial role in the GCM referral of those offenses.[366] The court permitted evidence of the remaining offenses to be submitted to a different convening authority.[367] In so doing, the CAAF noted that although military practice, unlike its federal civilian counterpart, does not limit conditional pleas to issues that are dispositive,

> the Analysis of the Military Rules of Evidence advises cautious use of the conditional plea when the decision on appeal will not dispose of the case . . . . Where a conditional guilty plea is not case dispositive as to either the issue preserved for appeal or as to all of the charges in a case, the military judge should address as part of the providence inquiry the understanding of the accused and the parties as to the result of the accused prevailing on appeal.[368]

Although the military judge initiated a discussion with the accused concerning the issue, the court found his inquiry inadequate.[369]

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359. *Id*. at 762.

360. *Id*.

361. MCM, *supra* note 4, R.C.M. 910(j). It is not clear if an unconditional guilty plea waives a motion to dismiss for violation of Article 10, UCMJ's statutory right to a speedy trial. *See* United States v. Birge, 52 M.J. 209 (1999) (deciding on other grounds and failing to reach this issue, despite the fact that appellate counsel presented it); *see also* United States v. Gutierrez, 57 M.J. 148, 149 (2002) (deciding the case on other grounds). *But see* United States v. Benavides, 57 M.J. 550, 554 (A.F. Ct. Crim. App. 2002).

362. MCM, *supra* note 4, R.C.M. 910(a)(2).

363. 59 M.J. 60 (2003).

364. *Id*. at 64.

365. *Id.*; *see* Kastiger v. United States, 406 U.S. 441 (1972).

366. *Mapes*, 59 M.J. at 72.

367. *Id*.

368. *Id*. n. 2.

Similarly, in *United States v. Proctor*,[370] the AFCCA had occasion to warn practitioners of the same concerns raised by the CAAF in *Mapes*. In *Proctor*, the appellant spent 161 days in pretrial confinement, including 107 days prior to preferral of charges against her.[371] The appellant entered a conditional plea of guilty, preserving the speedy trial issues for appeal.[372] The AFCCA reversed the trial judge's ruling and dismissed several charges and specifications with prejudice due to a violation of the 120-day provision in RCM 707, but found no Sixth Amendment or Article 10 violation, and did not dismiss those offense discovered after the imposition of pretrial confinement.[373] The speedy trial clock began to run on the date of preferral of charges for those offenses discovered after pretrial confinement was imposed, rather than the date of imposition of restraint.[374] The AFCCA noted that because of the

> all-or-nothing effect of RCM 910, allowing an appellant who enters a conditional plea to withdraw the plea if he prevails on appeal, staff judge advocates are cautioned not to enter into conditional pleas unless the matter is case dispositive . . . . In this case, appellant's speedy trial issue was not case dispositive, because it did not require dismissal of those charges for which the appellant was not placed into pretrial confinement. However, because the conditional plea was authorized for all the offenses, we must allow the appellant to withdraw his pleas.[375]

Finally, in *United States v. Shelton*,[376] the ACCA faced a conditional plea issue similar to the issue addressed in both *Mapes* and *Proctor*. Withdrawal from the plea in *Shelton*, however, was not authorized because the appellant did not prevail on any preserved issue on appeal. Shelton's pretrial agreement preserved for appellate review "any adverse determinations made by the military judge of any of the pretrial motions made at [appellant's] court-martial."[377] The defense made a motion to suppress based on the clergy privilege and also made a discovery motion for the CID Agent Activity Summaries.[378] "Based on the lack of emphasis given to the discovery motion at the trial level, the convening authority and staff judge advocate, and the parties at trial, may not all have been aware that appellant's conditional guilty plea preserved the discovery motion."[379] Additionally, the military judge mentioned that only the clergy privilege motion was preserved by the plea.[380] Citing *Mapes*, and in particular the CAAF's requirement that when a conditional plea is not dispositive the military judge address "the understanding of the accused and the parties as to the result of the accused prevailing on appeal,"[381] the court found that "the military judge failed to thoroughly address the parameters of the conditional guilty plea's impact."[382] Accordingly, the court found both motions were preserved for appeal.[383] The ACCA addressed both motions, but found the military judge ruled correctly as to the clergy penitent issues, and that any error flowing from his ruling as to the discovery issue did not amount to an abuse of discretion.[384] The ACCA held that the appellant was not entitled to any relief.

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369. *Id*.

370. 58 M.J. 792 (A.F. Ct. Crim. App. 2003), *petition denied*, _ M.J. _, 2004 (CAAF LEXIS 558 (2004).

371. *Id*. at 794.

372. *Id.*

373. *Id*. at 798.

374. *Id*. at 797.

375. *Id*. at 798 (citation omitted).

376. 59 M.J. 727 (Army Ct. Crim. App. 2004).

377. *Id*. at 728.

378. *Id*. at 728-29.

379. *Id*. at 729.

380. *Id*.

381. *Id*. (citing United States v. Mapes, 59 M.J. 60, 72 n.2 (2003)).

382. *Id*.

383. *Id.*

384. *Id*. at 732, 735.

Conclusion

1

This past year was an active one for the CAAF and the service courts in the areas of court-martial personnel, *voir dire* and challenges, and pleas and pretrial agreements. The upcoming year promises to be a busy and interesting one as well. As the UCMJ is employed abroad in hostile environments for a sustained period of time, its basic tenets are being tested. The next year may see the first of the cases tried in those hostile environments making their way through appellate review. The issues raised may fundamentally impact the military justice system, or they may reaffirm its resilience.

In the meantime, less system-shattering matters occupied the court this past year. The recurring theme to the issues of this past year reflects a lack of attention to detail by the parties, in particular the military judge and trial counsel. The courts' opinions indicate that they will set aside findings or sentences or both as required when lack of attention to detail materially prejudices a substantial right of a service member. The next couple of years will demonstrate if the courts' admonitions are translated into practice.